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IN THE

Supreme Court of the United States

October Term, 1966

No. 1201

LUCIO J. PEPE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 3

Constitutional and Statutory Provisions Involved .. 3

Statement of the Case 4

The Statements Which Are the Subject of the Instant Application for Certiorari 6

The Indictment 13

Reasons for Granting Certiorari 14

POINT I—Doctor Pepe, the petitioner, an Italian immigrant, licensed to practice medicine in New York and Italy, summarily sworn before a hearing reporter in his own apartment after normal business hours, was interrogated in an accusatory inquiry by a member of the State Police, three officials of the Department of Education, including the Director of Professional Conduct (which department had the power to suspend or revoke his medical license), and with the insidious help of a cooperating co-conspirator, posing as Pepe's "friend" (Dr. Baviello). Pepe was threatened, cajoled, tricked, and given "phony" promises in a staccato fashion, as a result of which he finally succumbed to this psychological pressure and uttered incriminating statements and a confession, which proved to be the sole evidence upon which his conviction was predicated.

PAGE

A—The interrogation before a hearing reporter and under oath by officials of the very department having jurisdiction over his medical license was by far more outrageous and extreme than the tactics condemned in Spevack v. Klein, — U.S. — (1967). Unlike Spevack, however, Petitioner did not have a legal background and not only was uninformed of his constitutional rights, but labored with a language handicap, as his native tongue was Italian.

B—In effect, Pepe was compelled to testify against himself in a "disbarment" proceeding 14

POINT II—The reprehensible methods used in the instant matter to extract incriminating statements from Petitioner (a physician) bear striking similarities to those which were condemned by this Court in Spano v. New York, 360 U. S. 315. If anything, the tactics used against Pepe were more extreme. Not only was a "false friend" (Dr. Baviello) brought in at the interrogation to lull Petitioner into a false sense of security and to make him "crack", but representatives of the very department which had the authority to revoke or suspend his medical license conducted the inquiry and also made numerous promises and threats. At no time, unlike Spano (who had been surrendered by an attorney), was Pepe ever advised of his legal rights. Like Spano, Pepe was an Italian Immigrant with a less than perfect command of the English language 23

POINT III—Under the principle laid down in Jackson v. Denno, 378 U.S. 368, the State of New York was obliged to afford a two stage review of the issue of voluntariness of statements in connection with criminal cases. Thus in People v. Huntley, 15 N.Y. 2d 72, the New York Court of Appeals provided for review of such issues of voluntariness,

PAGE

first before a judge and then a completely *de novo* hearing before the trial jury. In respect to Pepe, however, who did receive a post trial "Huntley Hearing" the prosecution introduced new evidence, which new evidence was only reviewed by the trial judge and never by a petit jury. This deprived Pepe of his constitutional right to trial by jury and violated the "equal protection of the laws" and "due process" clauses of the Fourteenth Amendment 32

CONCLUSION 34

APPENDIX A—Constitutional Provisions, Statutes and Rules Involved 35

APPENDIX B—People v. Pepe, 22 App. Div. 2d 417 (1964) Reproduced 37

Authorities Cited Cases

Blackburn v. Alabama, 361 U.S. 199 28

Cohen v. Hurley, 366 U.S. 117 19

Garrity v. New Jersey, — U.S. —, 17 L. Ed. 2d 562 (1967) 3, 27

Jackson v. Denno, 378 U.S. 368 ..... 3, 21, 32

Leyra v. Denno, 347 U.S. 556 (1954) 21, 28, 30

Malloy v. Hogan, 378 U.S. 1 ..... 19, 27

Miranda v. Arizona, 384 U.S. 436 (1966) 21

Norris v. Alabama, 294 U.S. 587 ..... 29, 31

People v. Huntley, 15 N.Y. 2d 72 (1965) 3, 4, 28, 32

People v. Laino, 10 N.Y. 2d 161 (1961) 17

PAGE

People v. Pepe, 22 App. Div. 2d 417 (1964) 36

People v. Steuding, 6 N.Y. 2d 214 (1959) 17

Sorrels v. United States, 287 U.S. 435 (1932) 26

Spano v. New York, 360 U. S. 315 (1959) 3, 21, 24, 26, 28, 29, 30, 31

Spevack v. Klein, — U.S. —, 17 L. Ed. 2d 574 (1967) 3, 15, 18, 20, 27

Stein v. New York, 346 U.S. 156 28

Stroble v. California, 343 U.S. 181 28

Townsend v. Sain, 372 U.S. 293 (1963) 21

Statutes

Code Crim. Pro. (N.Y.) § 395 35

Education Law (N.Y.) §§ 225, 6514 36

United States Constitution

Amendments V, VI, XIV 35

New York Constitution

Article I § 2 33

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No.

LUCIO J. PEPE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioner, Lucio J. Pepe, prays that a writ of certiorari issue to review the orders and judgments of the Court of Appeals of the State of New York which affirmed the convictions of petitioner for the crimes of unlawful acts in respect to examinations (New York Education Law § 225 (4), (5), (6) and conspiracy to commit the aforesaid violations (New York Penal Law § 580). Pepe was sentenced to three months' imprisonment, but this was stayed on February 6, 1967 by Mr. Justice John Harlan, and petitioner was continued in bail.

Opinion Below

No opinion was given by the Court of Appeals of the State of New York but the judgment of conviction was affirmed by a decision rendered December 29, 1966.* On

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* The Court of Appeals heard argument earlier, but ordered the determination withheld pending a *"Huntley"* hearing (15 N.Y. 2d 764).

March 2, 1967, the Court of Appeals amended the remittitur to reflect the fact that in deciding petitioner's appeal to that court it had necessarily passed upon questions under the constitution of the United States namely whether petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments had been violated in connection with the obtaining from him by the authorities of certain incriminating statements.

The Appellate Division wrote a *per curiam* opinion (one Justice dissenting) which appears in 22 App. Div. 2d 417, 251 N.Y.S. 2d 209 (1964) which is reprinted in the appendix to this petition, Appendix B.

Jurisdiction

The New York Court of Appeals affirmed the judgment of the Appellate Division, First Department which in turn had affirmed the judgment (one Justice dissenting) of the Supreme Court, New York County rendered January 4, 1963. On March 2, 1967, the New York Court of Appeals amended its own remittitur by certifying the existence of questions which it had considered involving the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

On February 6, 1967, Mr. Justice John Harlan of this Court granted a stay of the execution of the judgment herein (three months' imprisonment) and ordered that petitioner be continued on bail pending a determination of his petition for certiorari.

The jurisdiction of this Court is invoked under Title 28, United States Code § 1257(3), and Rules 19, sub. 1, and 22 of the Rules of this Court.

The Questions Presented for Review

1. Whether Petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments were violated when he was, in effect, compelled to give an incriminating statement in an investigation conducted by the New York State Department of Education (which controlled his right to practice medicine) and a representative of the New York State Police under a threat of having his license to practice medicine suspended or revoked if he did not cooperate? (*Spevack* v. *Klein*, — U.S. —, 17 L. Ed. 2d 574 (1967); *Garrity* v. *New Jersey*, — U.S. —, 17 L. Ed. 562 (1967).

2. Whether Petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments were violated, when he was lulled into a false sense of security by "false friends" during an accusatory interrogation before representatives of the New York State Department of Education and the New York State Police who promised him he would have "nothing to fear" if he told them the truth, and in reliance thereon Petitioner gave an incriminating statement (*Spano* v. *New York*, 360 U.S. 315).

3. Whether a defendant in the State of New York who challenges the voluntariness of an incriminating statement, is denied equal protection of the laws under the Fourteenth Amendment, when he is precluded from having a jury trial as to a portion of the evidence to determine voluntariness of such statement, although other defendants are accorded such jury trials on that issue. (See, *Jackson* v. *Denno*, 378 U.S. 368) (1934); (*People* v. *Huntley*, 15 N.Y. 2d 72 (1965).)

The Constitutional Provisions and Statutes Involved

The constitutional provisions are the "due process" and "equal protection" clauses of the Fourteenth Amendment as well as the Fifth and Sixth Amendments of the Constitution of the United States. The Statutes involved are Sections 225(4) (5) (6) of the New York Education Law;

Section 580 of the Penal Law; and Section 395 of the Code of Criminal Procedure of the State of New York. These constitutional provisions are set forth in the appendix to this petition, as are the pertinent statutes (Appendix A).

Statement of the Case

Petitioner Pepe is a licensed physician in the State of New York as well as in Italy. The co-defendant, Pietro D'Alba was a candidate for the medical licensing examination in New York in 1961.

The charges brought against Dr. Luigi Baviello, Petitioner, and his co-defendant, Pietro D'Alba, stemmed from a scheme wherein it was alleged that Pepe, Baviello, and D'Alba conspired with a Dr. Styles Ezell, Secretary of the Board of Medical Examiners of the State of New York, to obtain the questions for the forthcoming June 1961 Medical Board Examinations, and to then sell those questions and answers to prospective candidates for that examination.

Apparently Dr. Ezell, under a ruse of editorial inquiries, obtained a copy of the 1961 Examination from the Examination Editor (134-6, 173, 208, 210, 252, 353-4).*

It was alleged that Dr. Ezell transmitted a handwritten copy of this material to Petitioner Pepe (512, 1554-5, 1582-5, 1592-6, 1600-3, 1606-7), and Dr. Pepe gave the material to Dr. Luigi Baviello, who was a practicing New York physician (1559-60, 1575). It is alleged that Pepe and Baviello agreed to sell these questions for $20,000 (504-5, 634-9) and to share the receipts with Ezell (437-8, 500, 634, 641-2, 652-3, 1569-70, 1605-8).

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* Numerals in parentheses refer to pages of the Official Court Reporter's Minutes of Trial in the Supreme Court, New York County.. Any numerals preceded by the letter "H" refer to Minutes of the "Huntley Hearing" (*People* v. *Huntley*, 15 N.Y. 2d 72).

Dr. Baviello enlisted co-defendant D'Alba who was taking a review course in preparation for the examination. D'Alba agreed to get the money from other candidates in the course (439-42, 504, 597, 599, 603-5, 1624-9, 1654-8) and he solicited several candidates in order to raise $2,500 from each (1630-3, 1664-8, 1702-5, 1731-2, 1751, 1865-6, 1901, 1910-13, 1929, 1981, 1986-7).

A brief interval prior to the examination itself, D'Alba gave Baviello $10,000 for four (4) copies of the questions and answers to the first part of the examination and was "guaranteed" that the money would be returned if the questions were not correct (509-10, 608). Appellant Pepe received $5,000 from Baviello (510-11, 1568). Pepe supposedly gave $1,000 to Ezell (H. 115-16, 150).

Just prior to the examination, Ezell reported to Pepe that the examination had been withdrawn in Albany and that another had been substituted (1570-1, 1575-7, 1604). Pepe immediately cautioned Baviello that their scheme had been discovered (511) and Baviello notified D'Alba (511, 636-7), who in turn cancelled the arrangements with the other candidates (1700, 1704, 1785, 1872, 2059). The currency was returned, and the contraband material collected (511, 1568-9, 1637, 1872, 2065).

The New York State Department of Education which is the bureau that licenses physicians in the State of New York joined by the State Police commenced an investigation and questioned candidates who had been offered the questions (1706-15, 1807-10, 1915-18, 1954, 1957-8). As a result of the interrogations they learned the identities of alleged participants.

The investigators interrogated Pepe under oath before a hearing reporter in his own room on July 19, 1961 (1539, 1554-87; H. Exhibit 3). The record appears clear that he was intimidated and bullied, and then lulled into a false sense of security by threats and promises including exhortations from a "false friend" namely, Dr. Baviello,

who by this time was working with the authorities to obtain Pepe's confession. Pepe was brought to the Department of Education the following week (July 25th) and made another incriminating statement (1588-96, 1600-8; H. Exhibit 4). On both of these occasions he received no warnings of his rights.

Two weeks later, however, on August 9, 1961, Pepe was interrogated for a third time and gave a similar statement to the prosecuting attorney, this time being apprised of some of his rights (H. Exhibit 7). In the indictment which was returned on August 29, 1961, Pepe, D'Alba and Baviello were jointly charged with conspiracy and violation of Section 225 of the New York Education Law. Baviello however pleaded guilty to several charges and the trial later commenced only as against Pepe and D'Alba.

The Statements which are the Subject of the Instant Application for Certiorari

At the trial and during a so-called "Huntley Hearing" conducted subsequent to the trial by order of the New York Court of Appeals (15 N.Y. 2d 764), it appeared that Dr. Pepe, the Petitioner herein, was questioned under oath on July 19, 1961 in the presence of a hearing reporter by several people, including an investigator for the Department of Education, Howard Picard, August Bardo, Jr., Director of Professional Conduct of the Department of Education (who was also an attorney at law and had been an investigator for state agencies for over 14 years), and John Cronin of the New York State Police.

In addition, Dr. Luigi Baviello, Pepe's "friend" and conspirator, and Alfred Pockrass, another investigator for the Dept. of Education, were likewise present at this interrogation. It lasted, according to the stenographic report thereof between 6:15 and 8:05 P.M.

During the course of this questioning, Petitioner Pepe was quizzed in a staccato manner by several of the persons present and received a number of threats as well as assurances that if he cooperated, he had nothing to fear (1530-87, 1609-18). For example, the following are excerpts of the interviews with Dr. Pepe conducted by the licensing authority (N. Y. Education Department) and the State Police:

"*Examination by Mr. Bardo*:

"Question: Doctor, you obtained a medical license in this State when?

"Answer: Yes, in March.

"Question: In approximately March of 1961?

"Answer: Yes.

"Question: Doctor, we would like to have you tell us about something, and we would like to have you make these statements under oath.

"Answer: Yes.

"Question: He is a Notary Public. (A reporter) Would you raise your right hand, please?

"(At this point the witness was duly sworn by me.)

"Question: Doctor, we have talked with other persons in connection with this recent examination that was just given from June the 27th to June the 30th, 1961, and we have reason to believe that the questions that were proposed to be asked on this June examination were made known to persons in advance of the examination. Do you know anything about that?

"Answer: What?

"Question: That persons were made aware of the questions that were going to be asked on the June medical examination before it was given. Do you know anything about that?

"Answer: No; first time I hear this, because I don't believe the question before; it was impossible. That is what I think. I don't know. I don't know." (1540-1)

"Question: Doctor, I think we had better start over again. I think we'd better start over again.

"Answer: We have all subjects.

"Question: I know. Wait a minute, let's start over. Let's not get too deep into that. Dr. Luigi Baviello—he is here present—we have talked to him earlier today, and other people. Dr. Baviello, tell Dr. Pepe, in substance, what you told us.

"Mr. Picard: Let's get it straightened out.

"Mr. Bardo: We don't want you to go ahead and commit perjury, Dr. Pepe. Listen to what he has to say.

"Dr. Baviello: I said that I got the questions from you and you got the questions from Ezell. I said this. (1547)

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"*By Mr. Picard*:

"Question: *You don't want to place your license in jeopardy, you don't want to prejudice your medical license, do you?*

"Answer: *No, no.*

"*By Mr. Bardo*:

"Question: *Do you want to lose it?*

"Answer: *No, no, I don't want to lose it.*

"*By Mr. Picard*:

"Question: All right, *then cooperate with us and tell us the truth about this thing,* because all we want is your cooperation so we'll know what course of action to follow. Now, if you don't help us, necessarily, we're going to involve you, but deep. (1609-10)

"Question: We know a lot of things, Doctor, *You're committing perjury. You're under oath.* This is perjury you could be sent to jail for. Don't do it, please. Tell us what you know.

"Answer: This I know, this I know." (1610)

"*Mr. Picard*: (Continuing)

"Question: Your own intelligence should tell you, Doctor, that we're primarily interested in cleaning our own department. This is a wrong situation. Now, this—we can't tolerate this sort of thing, so we want to clean, to clean our own house, and we have come to you, with that thought

in mind, that you would cooperate with it. Now, lacking your cooperation, we're going to have to follow some other course of action. That's only natural. So this Doctor here, Baviello, has told us what we believe is the truth, and we have gotten the truth from a number of other doctors who were involved in this thing and who turned money over to him. Now, as I say, we also have the benefit of information we picked up during the course of our investigation: following people, *checking telephone records*, so we can tell you a long list—a lot of things, Doctor. I plead with you, don't perjure yourself.

"Answer: I don't want to perjure myself.

By Mr. Pockrass:

"Question: If you don't tell us the truth, you may find yourself before a Grand Jury, and perhaps facing a criminal indictment, instead of *merely* departmental action here.

"*By Mr. Picard*:

"Question: Do you want to go to State Prison? Then tell us the truth.

"*By Mr. Bardo*:

"Question: Tell us the truth, Doctor; we know.

"*By Mr. Picard*:

"Question: *We know the truth. Tell us the truth.*

"*By Mr. Bardo*:

"Question: What are you going to be a sucker for and take it all yourself? Right now it looks as though you got the questions. How did you get them? You got them from somebody. You'd better get rid of this thing. Don't keep it all—

"Mr. Picard: (Resuming questioning of Dr. Pepe):

"Question: Now, Doctor, do you want us to go to the Grand Jury with this and—.

"Dr. Baviello: Listen, I know—

"Question: You're putting him in jail and yourself in jail.

"Dr. Baviello: *We made the mistake. I know it's a bad thing that happened, but at this point I think it's better to clarify everything and maybe, you know, if we say the truth, maybe they will help us.*

"Question: That you can believe, Dr. Pepe, we will. We can't help, though, if you don't want to help yourself.

"Mr. Bardo: You're a sucker to go it alone.

"Question: You see, we're forced to go through with this. We can't stop now; but you can narrow the path that we follow. We are mainly concerned with our own family, the people in Albany. We want to correct this situation so it doesn't occur again, and I think you would agree that's proper. That's why we are here talking with you now." (1613-15)

"*By Mr. Picard*:

"Question: Tell us then, Doctor, tell us what you can. We'll forget about the rest of it. You're going can make sure that all examinations in the future are honest, without the necessity of the intervention of a Grand Jury. Now, do you want to tell us the truth of your participation, and whom you contacted, whom you got those questions, those notes from?

"Answer: I told you.

"Question: Well, when you're telling us that, we think you're lying, and you've been flatly contradicted by *Dr. Baviello, your friend here.*" *

"*By Mr. Picard*:

"Question: *Doctor, would you and your friend come out in the hall and talk to me just a minute,* and then we'll come right back in again. [This is page 23.]

"Answer: Anything you say, anything you say.

"(At this point, 7:35 p. m., Doctors Baviello and Pepe accompanied Mr. Picard out of the hearing room into the hallway. After a recess of about ten minutes, the above-mentioned three gentlemen returned and the hearing was continued.)" (1616-17)

Pepe gave an incriminating statement thereafter.

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* Dr. Baviello himself testified that he and Pepe were *close friends* and in fact had worked and lived together for three (3) years (662-665; 658; 642-3; 604; 436; 431). They also visited with one another.

At another point in the questioning Pepe was cautioned by Police Officer Cronin that if he did not cooperate he would wind up losing his medical license here and in Italy because these gentlemen will see to it" (1613-14).

At still a later time, Pepe was told "*you don't have to be afraid of anyone . . . .we'll take care of that*" (1615-16). Later Pepe was advised that "telephone calls had been traced" and "we know a lot of things . . . you committed perjury . . . you could be sent to jail . . ." (1551-2, 1610).

The interview contained a number of other similar instances, all of which clearly indicate that threats, cajoling, trickery and promises that amounted to guarantees of immunity were made to Pepe. As a further example petitioner was told that if he did not cooperate he would face a "criminal indictment" instead of merely departmental action (1612).

From all the foregoing, it is quite obvious that Pepe was clearly given the impression that if he cooperated no criminal charges would be brought against him and he would save his medical license, but that if he did not cooperate, he would not only suffer a loss of his ability to practice medicine here and in Italy but would also face criminal prosecution.

At no time was Pepe advised of his constitutional rights by any of his interrogators.

Another "interview" took place on July 25, 1961 at the Department of Education itself and as a result of that inquisition Pepe further incriminated himself in the scheme to sell examination questions and answers. On August 10, 1961, when questioned by the prosecutor, Pepe for the first time was advised of his constitutional rights and was again precipitated into giving an incriminating statement. On this occasion, only, was any pretense at all made warning Petitioner of his rights.

As an indication of how loathe Dr. Pepe was to inculpate himself and how disinclined he was to incriminate

himself, it need only be observed that once he obtained counsel, Petitioner refused to waive immunity before the Grand Jury and declined to answer any questions at all. It is therefore obvious that had he had the benefit of an attorney present he would have unquestionably refused to answer and consequently he would probably not have been convicted since concededly his statements were required to obtain a conviction.

It is obvious from the record however, that Dr. Baviello, by the time of the interviews with Pepe had already decided to cooperate with the authorities and appeared as a *"false friend"* imploring the Petitioner to cooperate. Baviello for example stated to Pepe "I think at this point, it is better to clarify everything, so we clarify, they will clarify, and maybe they will help us" (H. Exhibit 3, pp. 9-10). At another point Baviello stated to Pepe in the presence of the interrogators "I said that I got the questions from you and you got the questions from Ezell" (1547).*

It is clear from a perusal of this interview that the presence of Baviello was used to very good advantage to compel Pepe to "crack". For example, at one point Baviello interjected that Pepe had asked for $20,000. Pepe replied that that was not correct. That Pepe was compelled to correct this impression since he was now being put in a position of not only being oppressed by his interrogators, but being faced with apparently deliberate and provocative lies by a cooperating accomplice to evoke particular answers (1565-1567).

On none of these interviews was Pepe ever represented by counsel, and despite the fact that he was a native of Italy, and labored with a language problem, no effort was made to even enlist the help of an attorney or interpretor. Pepe, of course, understood English, but by the same token he was in a foreign country so far as his place of birth was concerned and he was fearful of losing his license to practice both in his home-land, as well as here.

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* See footnote on page 10, supra.

The very authority, namely the New York State Department of Education, which has the right to license physicians or discipline them including revocation of such license, conducted the interrogation of Petitioner in conjunction with a representative of the New York State Police. With obvious premeditated design, the insidious stratagem of having a cooperating co-conspirator present, Dr. Baviello, who also implored Petitioner to incriminate himself, unquestionably took its toll on Pepe's ability to resist his inquisitors.*

At the outset of the initial interrogation, it is clear that Pepe declined to say anything and denied his guilt completely. It was only after repeated threats, cajoling, promises and exhortations from various people, including his "friend", Dr. Baviello, that Pepe finally "cracked" and gave the highly incriminating statements which unquestionably resulted in his conviction.

The Indictment

The indictment herein charged Petitioner Pepe, Pietro D'Alba, and Luigi Baviello with violations of the New York Education Law, Section 225 (4), (5), (6), which involved "unlawful acts in respect to examinations" and also charged a violation of the conspiracy statute in New York State, *i.e.*, Penal Law Section 580.

Basically the indictment alleged that the defendants conspired with each other to secure questions and answers to the June 1961 New York State Medical Board Examination for the purpose of selling these questions and answers to candidates seeking to pass that examination and thereby obtain a license to practice medicine in this State.

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* The formality of having a hearing reporter administer an oath, coupled with the presence of officials of the Dept. of Education and the State Police, made this a "Kangaroo Court" and must have conveyed to Pepe the impression of a *formal* hearing not just an interview.

Reasons for Granting Certiorari

POINT I

Doctor Pepe, the petitioner, an Italian immigrant, licensed to practice medicine in New York and Italy, summarily sworn before a hearing reporter in his own apartment after normal business hours, was interrogated in an accusatory inquiry by a member of the State Police, three officials of the Department of Education, including the Director of Professional Conduct (which department had the power to suspend or revoke his medical license), and with the insidious help of a cooperating co-conspirator, posing as Pepe's "friend" (Dr. Baviello). Pepe was threatened, cajoled, tricked, and given "phony" promises in a staccato fashion, as a result of which he finally succumbed to this psychological pressure and uttered incriminating statements and a confession, which proved to be the sole evidence upon which his conviction was predicated.

—A—

The interrogation before a hearing reporter and under oath by officials of the very department having jurisdiction over his medical license was by far more outrageous and extreme than the tactics condemned in *Spevack* v. *Klein*, — U.S. — (1967). Unlike *Spevack*, however, Petitioner did not have a legal background and not only was uninformed of his constitutional rights, but labored with a language handicap, as his native tongue was Italian.

—B—

In effect, Pepe was compelled to testify against himself in a "disbarment" proceeding.

The facts herein reveal that Petitioner was a medical doctor licensed to practice here (New York) and in Italy. He unquestionably understood English, but his imperfect grammar and foreign birth reveal that he did labor with a language barrier—his native tongue being Italian.

Dr. Luigi Baviello, described by Pepe's interrogators as "your friend" was undoubtedly cooperating with the authorities who came to Pepe's apartment on July 19, 1961 with a hearing reporter to take a sworn statement from him concerning the theft and sale of the June 1961 medical board examination questions, a crime to which Dr. Baviello, who was also present, told Pepe he had already confessed and that he had implicated Petitioner, too (1547, 1617, H. Exh. 3, 9-10).

Those present, beside Baviello, at the interrogation were August Bardo, Jr.,* Director of Professional Conduct of the Department of Education, and two investigators with that agency, Pockrass and Picard, as well as Cronin of the State Police. The Department of Education, as Pepe unquestionably knew because he was so informed, had the power to suspend or revoke his medical license. Dr. Baviello was a "trojan horse" posing as a "friend", who undoubtedly contributed to the massive pressure exerted against Pepe by way of threat and promises and false hope of leniency which ultimately caused him to incriminate himself.

There is no denial that Pepe was never advised of his rights by any representative of the Department of Education and certainly by no one at all until August 10th when the prosecutor finally saw him and obtained a third incriminating statement. The assistant district attorney partially advised him of his rights on this third interrogation.

It is also conceded that at the crucial July 19th investigation, the inquisitors knew beforehand that Pepe was a prime suspect. *The inquiry was admittedly accusatory and not investigatory.*

This Court's recent ruling in *Spevack v. Klein,* — U.S. —, 17 L. Ed. 2d 574 (1967) clearly indicated that a con-

* Bardo was also a lawyer and an experienced investigator.

fession or incriminating statement is coerced if the declarant or suspect faces such pressures as "dishonor of disbarment" or the "deprivation of a livelihood" as the price for refusing to talk.

While *Spevack* dealt with an attorney who unquestionably was at least aware of his constitutional rights, the case at bar is far more extreme since Petitioner, Pepe, was not only a foreign born immigrant in this country, but moreover, undoubtedly was unaware of his constitutional rights in any meaningful sense.

The persons who questioned Petitioner during the crucial initial interview of July 19, 1961 at his apartment were not just some local police officials conducting an investigation, but on the contrary were officials of the Department of Education of the State of New York, which had plenary power to suspend or revoke Pepe's medical license or to otherwise discipline him.

It cannot be gainsaid that the threatened loss of a medical practice poses as great a calamity as the loss of the right to practice law and exerts as much pressure. Pepe faced interrogation in an *accusatory* "hearing" since his interrogators acknowledged that they were already fully aware of his participation in the crime because his co-conspirator, Dr. Luigi Baviello, who was also present, had already fully advised them of the circumstances. Baviello, who was described as Pepe's "*friend*" confirmed this fact and implored Pepe to cooperate fully indicating that this course of action alone could help him. Baviello testified that he and Petitioner were *close friends,* and had lived together for three years (662-665).

A hearing reporter, who was also a notary public, for the Department of Education was present to stenographical record the inquiry and administered an oath to Pepe before the interview commenced in Pepe's home on July 19, somewhat after 6 P.M. One of the persons present was August Bardo, Jr., who was *Director of Professional Conduct of the Department of Education.*

In addition, there were two other investigators with the Department of Education present, namely Pockrass and Picard. These three persons alone, to say nothing of Cronin who was a member of the New York State Police, would certainly lend the aura of officiality to the proceeding and unquestionably conveyed the impression that this was a *formal hearing* wherein Pepe's cooperation was mandatory, otherwise the full gamut of penalties within the jurisdiction of the Department of Education could be imposed upon Petitioner.

It is certainly quite unusual to administer an oath except at a formal type of hearing yet, according to the prosecution, this was merely an "informal" interview. The administration of the oath, *ipso facto*, was additional pressure applied against Pepe since he probably and understandably, felt, and was also told, that he could be punished for *perjury* if his answers were not completely truthful, in addition to everything else.

To attempt to draw a line of distinction between what occurred on July 19th, in Pepe's residence, and a proceeding before a Judicial Inquiry of the Bar Association would be to close one's eyes to the substance, in an attempt to equivocate on procedure. There can be no doubt that, in essence, Pepe was on the same anvil that a witness finds himself when he testifies before a Grand Jury under a waiver of immunity, or a judicial inquiry brought by a Bar Association.

Had the District Attorney subpoenaed Pepe to testify before a Grand Jury under oath without advising him of his rights, nor having him sign a waiver of immunity, there is no doubt but that Pepe could not have been indicted for any crime by that Grand Jury (*People* v. *Laino*, 10 N.Y. 2d 161 (1961); *People* v. *Steuding*, 6 N.Y. 2d 214 (1959).*

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* The promises of Bardo who was Director of Professional Conduct of the Dept. of Education, as well as an attorney, might be deemed a promise of immunity under § 395, Code Crim. Pro. (App. A).

The officials of the Department of Education, however, as has already been demonstrated in this petition, assured Pepe that his cooperation would obviate the necessity of his appearing before a Grand Jury and would preclude the possibility of criminal action being taken against him.

Pockrass for example clearly advised Pepe that unless he told the truth ". . . you may find yourself before a Grand Jury, and perhaps face a criminal indictment *instead of merely Departmental action here*". Picard then interjected "do you want to go to State Prison? Then tell the truth" (1611-1616).

The inescapable impression given to Pepe was that this interview itself was part and parcel of "departmental action". Pepe was not advised of any of his rights, but on the contrary was threatened with possible revocation of his license, here and in Italy unless he cooperated. Pepe was further lulled into a false sense of security by the supplications of Dr. Baviello his *"friend"* and co-conspirator who told him that he himself had already fully cooperated and confessed, had implicated petitioner, and advised Pepe that only by full cooperation could he hope to help himself (1611-1615).

In retrospect, of course, it is manifest that Pepe was deluded, tricked, and victimized because the very statements and confession which he gave turned out to be the sole evidence upon which his conviction would stand or fall (2974-5).

Returning for the moment to *Spevack* v. *Klein, supra,* it does not appear that any material difference really exists between what occurred with Pepe and what was experienced by *Spevack.* Both were professional people who were licensed to practice in the State of New York. *Spevack* had the distinct advantage of being a lawyer and therefore was presumably cognizant of his constitutional rights, whereas Pepe was not only an Italian immigrant with a language problem, but additionally had no inkling, in all likelihood, of his rights.

This is particularly evident from the fact that when Pepe, on August 10, 1961, following his third incriminating statement to the authorities, was finally advised of his rights, he thereafter refused any further interviews and retained a lawyer who admonished him to stand mute and not to waive immunity before the Grand Jury.* Had legal advice been given to him immediately, or had his rights been explained to him it is logical and probable that under no circumstances would the confession and statements have been wrested from him.

As is recognized, the sole distinction between *Spevack* and the instant case is that the former matter, a judicial inquiry was involved whereas here the interrogation was conducted by responsible officials of the licensing agency itself, namely the State Department of Education—quite analogous to a judicial inquiry.

So far as Pepe was concerned, the interrogation by the Department of Education was undoubtedly more formidable, awesome, and potentially dangerous to his medical license and economic survival than any interrogations before a Grand Jury.

This Court has held quite recently that the Fifth Amendment's self incrimination clause was certainly applicable to the states by reason of the Fourteenth Amendment (*Malloy* v. *Hogan,* 378 U.S. 1). In *Spevack* v. *Klein, supra,* this Court explained that it necessarily had to overrule *Cohen* v. *Hurley,* 366 U.S. 117, in view of what had transpired in *Malloy* v. *Hogan, supra.* In *Spevack,* this Court explained that despite the fact that a person holds a professional license such as a lawyer (or doctor), he is nevertheless entitled to the full protection of the Fifth and Fourteenth Amendments. Thus, this Court elaborated (*id.* 17 L. Ed. 2d at 277):

> "*And* so the question emerges whether the principle of Malloy v. Hogan is inapplicable because

petitioner is a member of the Bar. We conclude that Cohen v. Hurley should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the *deprivation of a livelihood as a price for asserting it.* These views, expounded in the dissents in Cohen v. Hurley, need not be elaborated again.

"We said in Malloy v. Hogan:

'The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement —the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, *and to suffer no penalty . . . for such silence.*' 378 US, at 8, 12 L ed 2d at 659." (Italics ours)

While the Fifth Amendment is sometimes thought to refer to "criminal penalties", this Court's decision in *Spevack* v. *Klein, supra,* made it quite obvious that the context of "penalty" refers not only to a fine or imprisonment, but also to the imposition of any sanction which makes the assertion of the Fifth Amendment privilege *"costly"*.

"In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in Griffin v. California, 380 U.S. 609, 14 L ed 2d 106, 85 S Ct 1229, the imposition of *any sanction which makes assertion of the Fifth Amendment privilege 'costly'. Id.* at 614, 14 L ed 2d at 109. . . .

"The threat of disbarment and the *loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion* to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as 'the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . .' United States v. White, 322 U. S. 694, 698, 88 L ed 1542, 1546, 64 S Ct 1248, 152 ALR 1202. As we recently stated in Miranda v. Arizona,

> 384 U.S. 436, 461, 16 L ed 2d 694, 716, 86 S·Ct 1602, 10 ALR 3d 974, 'In this Court, the privilege has consistently been accorded a liberal construction.' It is in that tradition that we overrule Cohen v. Hurley. We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others." (Italics ours)

The damage of course, had been done already and the trial almost became an "*inquest*" since the admissions of Pepe and his confession virtually precluded any result other than that of "guilty".

The officials of the State Department of Education and the State Police who succeeded in extracting the confession and incriminatory statements from Pepe did not only use these to bring revocation proceedings against his medical license, but turned them over to the prosecuting authorities who were then able to obtain an indictment and ultimate conviction of the Petitioner. The charge of the trial Court acknowledged that these statements were so vital that they were the *sine qua non* of his conviction. It cannot be denied that sans these statements, the prosecution would have had an insufficient case to even go to the Grand Jury, no less a Petit Jury (2974-5).

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this court stated that the very fact that threats, trickery, and cajoling are utilized is of itself convincing evidence that statements thereby obtained are not voluntary and were not obtained by a waiver of constitutional rights. Thus this Court declared (*id.* 384 U.S. at 486):

> "Moreover any evidence that the accused was threatened, *tricked* or cajoled into a waiver will, of course, show that the defendant did *not* voluntarily waive his privilege."

Accord: *Townsend* v. *Sain*, 372 U.S. 293 (1963); *Spano* v. *New York*, 360 U.S. 315 (1959); *Leyra* v. *Denno*, 347 U.S. 556 (1954); and *Jackson* v. *Denno*, *supra*.

The threat of imprisonment, while a powerful form of compulsion, could not nearly have frightened Pepe as much as the possibility of losing his right to practice medicine here and in Italy, with the consequent complete nullification and ruination of all the years of preparation, time, expense, and "blood, sweat and tears" which preceded his becoming a medical doctor.

With such a catastrophe looming over him, coupled with the promises of the officials of the Department of Education, to say nothing of the assurances of his "false *friend*", Dr. Baviello, that cooperation would be his salvation, is it any wonder that Pepe ultimately gave in and fully cooperated with his interrogators giving them the highly incriminating statements which alone resulted in his conviction? (2974-5)

It is therefore submitted that *Spevack* v. *Klein, supra,* is not nearly as shocking as the instant case, and the doctrines there laid down should be applied to the case at bar, otherwise an irreparable injustice will result.

POINT II

The reprehensible methods used in the instant matter to extract incriminating statements from Petitioner (a physician) bear striking similarities to those which were condemned by this Court in *Spano* v. *New York*, 360 U. S. 315. If anything, the tactics used against Pepe were more extreme: Not only was a "false friend" (Dr. Baviello) brought in at the interrogation to lull Petitioner into a false sense of security and to make him "crack", but representatives of the very department which had the authority to revoke or suspend his medical license conducted the inquiry and also made numerous promises and threats. At no time, unlike Spano (who had been surrendered by an attorney), was Pepe ever advised of his legal rights. Like Spano, Pepe was an Italian Immigrant with a less than perfect command of the English language.

The Petitioner herein was licensed to practice medicine in Italy and in New York as well. He had obtained his license in this state about four months before the incidents which gave rise to the instant indictment.

Highly skilled investigators as well as representatives of the State Police and the New York State Department of Education had obtained admissions from Dr. Luigi Baviello, a co-conspirator of Pepe's, that Pepe was involved in a scheme with Baviello and others to secure questions and answers to the June 1961 Medical Board Examinations and to sell those questions and answers to candidates who were taking that examination.

Knowing therefore that Pepe was a *prime suspect*, these highly experienced investigators, one of whom at least was an attorney at law (August Bardo, Jr.) procured the cooperation of Dr. Luigi Baviello who was described as a *"friend"* of Pepe's, and descended on Pepe's residence

at about 6:15 P.M. in the evening of July 19, 1961 without advising him of any of his rights whatsoever.

During this interview, Pepe at first completely denied any involvement whatsoever in the crime. Baviello was then brought into the picture as a "Trojan Horse" and it was he who implored Pepe to cooperate (1615). Baviello admitted he and Pepe were close friends (662-665).

As has already been set forth, an assortment of threats and promises were made by the authorities to Pepe. On the one hand he was told that if he cooperated in helping the Department of Education "clean its own house", there would be no need to have this brought before a Grand Jury. Thus, he was in effect assured that his cooperation would stand him in good stead; that he would have nothing to fear criminally; and that he would save his license to practice medicine thereby.

On the other hand, he was sternly threatened with loss of his medical licenses in the United States and Italy and by criminal prosecution and possible incarceration if he refused to cooperate. He was told that "telephone calls had been traced" and that "we know a lot of things . . . you committed perjury * . . . you could be sent to jail" (1610-15).

Then Mr. Picard, an investigator for the Department of Education which had jurisdiction over Pepe's medical license, invited the Petitioner and his "*friend*" Dr. Baviello to step outside of Pepe's room and the shorthand reporter made a notation that this trio were absent from the hearing for ten minutes (1617). Upon return to the room Pepe suddenly started to cooperate with the authorities.

In the *Spano* case, the defendant there had been advised by an attorney at law prior to his surrender to the District Attorney. He at least knew his rights. Notwith-

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* The July 19th interrogation was conducted after a hearing reporter who recorded the conversations, had administered an oath to Pepe. He therefore was fearful of *perjury* in addition to other threats hurled at him.

standing that substantial benefit, this Court unanimously reversed his conviction on a number of grounds, not the least of which was the employment of a "false friend" to convince him to cooperate and incriminate himself.

At another juncture Dr. Baviello was brought into the picture and he stated (H. Exh. 3, 9-10; 1547):

> "We made the mistake. I know its a bad thing that happened, but at this point I think I think it is better to clarify everything, and maybe, you know, if you say the truth, maybe they will help us."

Immediately after this, Picard interjected "that you can believe, Dr. Pepe, we will". Then Bardo interjected, "We are mainly concerned with our own family, the people in Albany. We want to correct this situation so it doesn't occur again. . . ." Picard then took up the cudgels and interjected, "Tell us then, Doctor, tell us what you can. *We'll forget about the rest of it.* You're going to make sure that all the examinations in the future are honest, *without the necessity of the intervention of the Grand Jury*" (1612-18).

Dr. Baviello was referred to as Pepe's "your *friend*" here". Picard then invited Pepe and "your friend to come out in the hall and talk a few minutes" (1617). This Pepe did and shortly thereafter began to give incriminating statements.

Pepe was told that if he did not cooperate he would lose his license here and in Italy "because these gentlemen will see to it". Later Pepe was assured "you don't have to be afraid of anyone . . . we'll take care of that". At another point Pepe was told "telephone calls had been traced" and "we know a lot of things . . . you committed perjury . . . you could be sent to jail . . .". The interrogators indicated that cooperation would mean merely departmental action

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It is important to note that Dr. Baviello testified that Pepe and he were *close friends* and had lived and worked together for three (3) years (662-665; 658; 642-3; 604; 436; 431).

whereas failure to cooperate would possibly involve him in a "criminal indictment" (1547, 1612-1618; H. Exh. 3, 9-10).

Coupled with the foregoing is the fact that promises of all sorts were made to Pepe that no harm would come to him if he cooperated and then his "friend" Dr. Baviello was brought into the picture to further lull him into a state of mind whereby he would be disposed to cooperate. As stated in *Spano* v. *New York,* 360 U.S. 315, 323:

> "Petitioner was apparently unaware of John Gay's famous couplet:
>
> 'An open foe may prove a curse
> But a pretended friend is worse,'
>
> and be yielded to his false friend's entreaties."

Mr. Justice Roberts observed in *Sorrells* v. *United States,* 287 U.S. 435 at 453 (1932), in which Mr. Justice Brandeis and Mr. Justice Stone concurred that:

> "The efforts . . . to obtain arrests and convictions have too often been marked by reprehensible methods. . . ." Justice Roberts continued by referring to these methods as a "prostitution of the criminal law," (*id.* 287 U.S. at 457).

In the case at bar, Pepe of course did not have the benefit of legal advice prior to this interview and was unquestionably "disarmed" by the fact that not only was his friend Dr. Baviello asking him to cooperate, but representatives of the Department of Education of the State of New York which controlled his license to practice medicine likewise indicated that they would be friendly and helpful if he only cooperated.

That these promises were completely false is obvious from the fact that Pepe was later indicted, convicted on the basis of his incriminating statements and has now been sentenced to jail for three months. His licenses to practice medicine are in serious jeopardy both in New York and presumably in Italy. As a matter of fact, revocation proceedings were instituted by the Department of Education of the State of New York and only a stay now stands between him and possible complete disbarment from practice.

It must be borne in mind that Dr. Baviello had unquestionably already made a "deal" with the authorities since he plead guilty shortly after the indictment and was never tried. There is no doubt that his service in procuring Pepe's incriminating confession was a factor which militated strongly in Baviello's favor. In every sense of the word, the interrogation under oath of Pepe was a "Kangeroo Court" which in effect was conducting a "Star Chamber" type of hearing which would irrevocably lead to his indictment, conviction and loss of his medical license.

Following the July 19 meeting with the authorities, there was no problem in obtaining corroborative incriminating statements at another hearing in the Department of Education on July 25,* and finally at an interview with the prosecutor himself on August 10. When Pepe finally did procure legal advice, after August 10th, he refused to cooperate with the authorities, declined to waive immunity, and said nothing further. It is obvious therefore that had he known fully of his legal rights, he would unquestionably have refused to say anything detrimental to himself. No doubt the concept of "immunity" or the "Fifth Amendment" were completely foreign to him particularly in view of the fact that he was an Italian immigrant with very little knowledge of law.

In *Malloy* v. *Hogan*, 378 U.S. 1, 8, this Court declared that the Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against Federal infringement. The same sentiment was reiterated by this Court in the case of *Spevack* v. *Klein* U.S.—17 L. Ed. 2d 574 (1967) and *Garrity* v. *New Jersey* — U.S. — 17 L. Ed. 2d 562 (1967).

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* Howard Rice, an investigator with the Dept. of Education for 14 years and a former State Trooper for 14 years treated the threats as proper. "A little bit of fear helps"—fear helps to "prod" a reluctant witness (1345).

While it may be true that in the case at bar a "Huntley Hearing" (pursuant to *People* v. *Huntley*, 15 N.Y. 2d 72) probed the issue of voluntariness of the confession, it is quite obvious that the issues with respect to employment of a "false friend" and "threat of economic reprisal" were raised but were not fully appreciated by the New York Courts.

To this extent this case parallels *Spano* v. *New York, supra,* since there too, a very careful analysis of the factual situation involving Spano's confession was made, but it remained for this Court to determine that "traditional" concepts of voluntariness had been violated by the employment of the tactics there utilized. It is therefore again incumbent upon this Court to reemphasize its position that it will not tolerate the invasion and deprivation of constitutional rights by the use of psychologically coerced confessions (cf. *Leyra* v. *Denno,* 347 U.S. 556, [1954]).

—A—

***Spano* v. *New York* is a controlling precedent. The case at bar contains more compelling reasons for reversal than *Spano*.**

In *Spano* v. *New York,* 360 U.S. 315 (1959) this court had occasion to condemn tactics of public authorities in obtaining a confession that were far less extreme than those evident in the case at bar. *Spano* had been convicted of a serious crime in the State of New York and the conviction was affirmed 4-3 by the New York Court of Appeals. However, all seven judges were convinced that the confession in the *Spano* case was not involuntary under 'traditional" principles laid down by this Court in such cases as *Stein* v. *New York,* 346 U.S. 156; *Malinski* v. *New York,* 324 U.S. 401; *Stroble* v. *California,* 343 U.S. 181; *Blackburn* v. *Alabama,* 361 U.S. 199, and similar cases.

In reversing the conviction in the *Spano* case, however, this court disagreed with all seven judges of the New York Court of Appeals from the standpoint of involuntariness under "traditional" principles theretofore laid down by this Court.

In the main opinion in *Spano* written by the Chief Justice, this court held that it had the duty to make its own examination of the record (*Norris* v. *Alabama*, 294 U.S. 587; *Spano* v. *New York*, 360 U.S. at 316). After making that independent determination, this Court concluded that by the "traditional" interpretations of the Fourteenth Amendment, Spano's confession was involuntary.

It is contended herein that this court has an even more compelling duty to review the record in the case at bar, and upon such review, petitioner is confident that this court will conclude that Pepe's confession and statements were involuntary, not only as a matter of law, but under "traditional" standards as set forth and explained in *Spano* v. *New York*, supra, and other cases.

While it is true that the dissenting opinion in *People* v. *Spano*, 4 N.Y. 2d at 266, discloses that three judges of the New York Court of Appeals were of the opinion that the omission to supply counsel to *Spano* was an egregious error, and at least four justices of this Court appear to have agreed with that sentiment, the actual holding of this Court in *Spano* v. *New York* was based upon "traditional" interpretations of the Fourteenth Amendment as to the issue of voluntariness.

In the case at bar, a "false" friend, Dr. Luigi Baviello,* who was also a co-conspirator, was utilized in much the same manner as Patrolman Bruno had been during the interrogation of Vincent Spano. Baviello lulled Pepe into a false sense of security by indicating that cooperation was

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* See footnote page 25, supra. Baviello admitted Pepe and he were *close friends* and lived and worked together for three years.

his only salvation and likewise caused Pepe to lose all hope, by disclosing that he, himself, had already deeply implicated Pepe in the criminal transgression.

It is obvious that at first Pepe decided to disclose nothing to the authorities but after interrogation by several skillful investigators, and cajoling and supplications by Baviello, coupled with threats and promises uttered by representatives of the New York State Department of Education (which Department controlled his license to practice medicine), petitioner, an Italian immigrant with a language problem, finally succombed after a clandestine discussion outside of his room with Picard, an investigator with the Department of Education, and his "*friend*" Dr. Baviello (1617).

In every sense of the word, psychological pressure, which was perhaps *more potent than physical torture* was devastatingly utilized (See *Leyra* v. *Denno,* 347 U.S. 556; *Spano* v. *New York, supra.*)

It must be borne in mind that Pepe was not being interrogated by local police authorities alone, but by officials of the New York State Department of Education including the director of professional conduct of the Department of Education (Bardo) and there can be no doubt that these officials could be instrumental in disciplining Pepe in many ways, including the suspension or revocation of his medical license both here and possibly in Italy.

A hearing reporter who was also a notary, employed by the Department of Education administered an oath to Pepe and the interrogation proceeded as if a formal hearing was being held. At more than one occasion Pepe was warned that he was committing "perjury" because he was under oath. This was certainly an additional factor which did not even appear in the *Spano* case.

Under the circumstances present therefore it is submitted that there can be no doubt but that Pepe's will was

overborne by skillful interrogation in his own room, after normal business hours, with the cunning utilization of threats of economic destruction, incarceration, disgrace, use of a "false friend", and administration of an *official oath* giving the aura of an *official* inquiry by the licensing agency controlling his medical practice. It is difficult to conceive of anything more coercive and more shocking to the conscience of this Court than the tactics which were practiced upon the Petitioner herein.

Finally, it is no answer to argue that Pepe had every opportunity to probe the question of voluntariness since the same was true to a significant extent, in *Spano* v. *New York.* This Court, in *Norris* v. *Alabama, supra,* and *Spano* v. *New York, supra,* has held that it must make an *independent review* of the record and cannot be concluded in a situation such as this by the determinations of the State Courts. Any other rule would necessarily mean that standards falling far below the minima required by the Fourteenth Amendment could be applied to extract confessions. This court never has, nor should it, countenance such deviations from the minimal standards it has prescribed in testing and determining voluntariness.

POINT III

Under the principle laid down in *Jackson* v. *Denno*, 378 U.S. 368, the State of New York was obliged to afford a two stage review of the issue of voluntariness of statements in connection with criminal cases. Thus in *People* v. *Huntley*, 15 N.Y. 2d 72, the New York Court of Appeals provided for review of such issues of voluntariness, first before a judge and then a completely *de novo* hearing before the trial jury. In respect to Pepe, however, who did receive a post trial "Huntley Hearing" the prosecution introduced new evidence, which new evidence was only reviewed by the trial judge and never by a petit jury. This deprived Pepe of his constitutional right to trial by jury and violated the "equal protection of the laws" and "due process" clauses of the Fourteenth Amendment.

The Fourteenth Amendment of the United States Constitution guarantees that no state may deprive any person of due process of the law or of the equal protection of the laws. At his trial, the recent decision of this Court in *Jackson* v. *Denno*, 378 U.S. 368 had not yet been pronounced. Under the then existing law at the trial, therefore, Pepe did not receive the constitutionally fair hearing which *Jackson* v. *Denno* requires. The New York Court of Appeals accordingly remanded the instant case to the trial court for a hearing pursuant to *People* v. *Huntley, supra,* which it had shortly before decided, in order to implement this Court's ruling in *Jackson* v. *Denno*.

The Appellate Division herein even recognized that the charge on confessions was less than careful. The *dissent* called the charge an *"error of constitutional dimension."* (See Appendix B, p. 42, *infra.*).

At the *Huntley* Hearing, there can be no dispute but that the prosecution introduced new or additional evidence

which had never been presented to the trial jury.* The procedure in New York clearly makes trial by jury mandatory even with respect to the question of voluntariness of confessions and admissions. It is therefore manifest that to the extent that the prosecution introduced new and additional evidence and produced new and material witnesses on the question of voluntariness, Pepe was denied equal protection of the laws because no trial jury was ever impanelled to resolve this important question. It must be borne in mind that the confession here was not merely "cumulative" evidence but was indispensable evidence which required acquittal if for any reason the confession should be deemed inadmissible (2974-5). Viewed in this light it is clear that Pepe was denied a very important constitutional guarantee by being deprived of a trial jury's determination of this crucial issue. Trial by jury is guaranteed to *all* persons prosecuted by indictment in New York (N. Y. Const. Art. 1 § 2).

No doubt the District Attorney will argue that trial by jury on this issue is not mandated by this Court since under the "orthodox" rule a jury trial is never accorded. Be that as it may, the simple fact remains that in New York State, the "Massachusetts" rule is extant and a jury trial is mandatory even on the question of voluntariness. To the extent that this important right was denied to Pepe, his rights under the equal protection and due process clauses of the Fourteenth Amendment were violated.

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* At the Huntley Hearing testimony of Stiles Ezell (H-48-160), Jerome Kidder (H-18-29) and William Jones (H-29-33) was received. These witnesses never testified at trial and no petit jury ever considered their credibility. Ezell had been secretary to the N. Y. Board of Medical Examiners, while Kidder and Jones were assistant district attorneys. They were vital witnesses.

CONCLUSION

For the reasons stated, it is respectfully requested that a writ of certiorari issue to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX A

Constitutional Provisions, Statutes and Rules Involved

Constitution of the United States

Amendment V

. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law;

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. Code of Criminal Procedure

§ 395. Confession of defendant, when evidence, and its effect

A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.

Appendix A

N.Y. Educational Law

§ 225. Unlawful acts in respect to examinations

A person who shall: . . .

4. Have in his possession question papers to be used in any such examination, when not contained in their sealed wrappers, or copies of such papers or questions, at any time prior to the date set for such examination, unless duly authorized by the regents or the commissioner of education; or

5. Sell or offer to sell question papers or any questions prepared for use in any examination held in accordance with this chapter or with the rules of the university; or

6. Use in any such examination any question papers or questions, or secure or prepare the answers to such questions prior to the time set for the examination; . . . is guilty of a misdemeanor and upon conviction thereof shall be punished for a first offense by a fine of not less than fifty dollars or imprisonment for not less than thirty days, or by both such fine and imprisonment, and for a second offense by a fine of not less than two hundred and fifty dollars or imprisonment for not less than six months or by both such fine and imprisonment.

§ 6514. Revocation of certificates; annulment of registrations

2. The license or registration of a practitioner of medicine, osteopathy or physiotherapy may be revoked, suspended or annulled or such practitioner reprimanded or disciplined in accordance with the provisions and procedure of this article *upon decision after due hearing in any of the following cases*:

(b) That a physician, osteopath or physiotherapist has been convicted in a court of competent jurisdiction, either within or without this state, of a crime;

APPENDIX B

22 A.D.2d 417

The PEOPLE of the State of New York, Respondent, v. Lucio J. PEPE, Appellants.

Supreme Court, Appellate Division, First Department, July 2, 1964

Before BREITEL, *J. P.*, and VALENTE, MCNALLY, STEVENS and STEUER, *JJ.*

Per Curiam.

Defendants were convicted after trial on five counts of unlawful acts in respect to examinations (Education Law, § 225(4), (5) and (6)) and one count of conspiracy to commit such crimes. The trial established the following facts: The Secretary of the Board of Medical Examiners obtained a copy of the examination questions for the June, 1961, examination to be given by the Board. Dr. Ezell gave a copy of these questions to defendant Pepe, a licensed physician. Pepe arranged with Dr. Baviello, another practicing physician, to sell the questions to candidates who would take the examination. For this Pepe was to receive $20,000 which he would share with Dr. Ezell. Dr. Baviello contacted defendant D'Alba, who was a physician licensed in Italy and who was a candidate to take the examination. As a result of this contact, D'Alba agreed to raise the money from such of his fellow candidates as would pay to have the questions. He raised a fund of something less than $10,000. He made up the balance himself. Dr. Baviello accepted this sum and delivered the questions to D'Alba who in turn distributed them to his subscribers. Before the examination was held the leakage of the examination questions was discovered and new questions were substituted. All of the persons mentioned learned of this, the

money was returned and the copies of the questions were destroyed.

Both defendants gave statements to the State Department of Education. These statements consisted of questions and answers given under oath in the Department's investigation, which, when transcribed, were signed by the respective defendants. The statements, properly designated as confessions, were received in evidence at the trial. It was claimed on the trial that the confessions were not given voluntarily. It is further argued on this appeal thta the jury was not adequately instructed in regard to whether they could consider the confessions, specifically on the degree of proof required. We are in accord that this presents the only substantial question on this appeal.

We conclude that there was no error in this respect. It may be conceded that a more careful treatment would have avoided the appearance of error, and that requests to charge phrased in the language of People v. Vargas, 7 N.Y.2d 555, 200 N.Y.S.2d 29, 166 N.E.2d 831, could well have been given. It is well to distinguish between error and a faultless performance. It is the instructions given and not the technique of the judge that is the criterion.

The court did charge that unless the confessions were voluntary they could not be considered. He defined what is meant by voluntary. He also charged that every element of the prosecution's case must be established beyond a reasonable doubt. The alleged error is that these were not correlated, in that it was not specifically charged that the confessions must be shown to be voluntary beyond a reasonable doubt. However, after the conclusion of the main charge, and one of the final instructions given, was a compliance with a request by defendant Pepe. The court charged:

> "[I]f the jury have any reasonable doubts as to whether the statements under oath, dated July 19th,

1961, and July 25th, 1961, were obtained by the use of fear induced by threat, then and in that event they must find the defendant Pepe not guilty."

As far as this defendant is concerned, he had the benefit of his own statement of what the law is on the subject and he can hardly be heard to complain. As far as D'Alba is concerned, it is inconceivable that the jury would apply any other test to his confession than they were instructed to give to his co-defendant's. And it may well be that the court in refusing D'Alba's request of a similar nature so deemed. (D'Alba's request having been submitted in writing, the jury could not have known that it was refused or draw any distinction between the defendants from the refusal.)

Furthermore, there is very grave doubt as to whether any issue existed as to D'Alba's confession being voluntary. On the advise of counsel he waived immunity and testified before the grand jury. His testimony, received in evidence, parallels, almost exactly, the questions and answers he gave to the Department of Education. While he testified on the *voir dire* that he had perjured himself before the grand jury and stated in general terms that none of the testimony given there was true, when he came to testify in his own defense, as to most of the matters his evidence exactly followed the two prior statements. So that according to his own version, his testimony before the grand jury and his statements in his confession fairly represent his acts. While the fact that a confession is true does not ipso facto make it voluntary, when that confession is exactly like a statement that is concededly voluntary, it must go a long way toward establishing that the confession was freely given.

The judgments of conviction should be affirmed.

Judgments of conviction affirmed.

All concur except VALENTE, *J.*, who dissents in dissenting opinion.

Appendix B

VALENTE, *Justice* (dissenting).

I dissent and would reverse the judgments of conviction and order a new trial. I find that the Trial Court's instructions as to how the jury were to discharge their responsibility in determining whether confessions obtained from defendants were uncoerced and voluntary, failed adequately and fairly to set forth the essential matters to be considered in arriving at their conclusion. The inadequacy of the instructions given, coupled with the refusal of the Trial Court, when requested, to charge additionally on the subject, constituted prejudicial error, as a matter of law, requiring a reversal and the granting of a new trial.

From the time the selection of the jury began and the verdict was rendered, the trial consumed a period of about eight weeks. As part of the prosecution's proof, the People relied upon incriminating statements, i.e., confessions, of the appellants. However, before the confessions were admitted into evidence, defendants challenged their voluntary character, and an extensive *voir dire* inquiry (covering about 700 pages of the record) was conducted as to the conditions under which the confessions were obtained. The Trial Judge properly concluded to submit to the jury for their determination the question of the voluntariness of the inculpatory statements.

Despite the extensive examination on the issue of the voluntariness of the confessions, the Trial Judge gave but a perfunctory charge on the subject of their admissibility in the following words, that "any statements allegedly made by defendants to anyone in which they admitted their guilt to the crime, may be given in evidence against them, unless such statements were made under the influence of fear produced by threats or were made as a result of physical beatings." At the conclusion of the charge, the Trial Judge, at the request of defendant Pepe, did additionally instruct the jury to some further degree on the matter of

Pepe's confessions. But even these supplementary instructions as to Pepe were too little and too late. Moreover, not having been given in the mainstream of the charge, where they properly belonged, the additional instructions as to Pepe were drained of their effectiveness in directing the jury's attention to this critical phase of Pepe's defense.

But a comprehensive request by counsel for D'Alba for a charge on the essential elements to be considered in arriving at a conclusion as to the voluntariness of D'Alba's confessions and for a specific charge that the standard of proof to be applied was that of "beyond a reasonable doubt," was refused by the Court. The charge requested by D'Alba's counsel was proper and should have been given to the jury. There can be no dispute that the correct standard of proof is that of "beyond a reasonable doubt". (See People v. Vargas, 7 N.Y.2d 555, 200 N.Y.S.2d 29, 166 N.E.2d 831; People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553; People v. Valletutti, 297 N.Y. 226, 78 N.E.2d 485.)

Despite the refusal to charge as requested by defendant, D'Alba, the People nevertheless contend that there was sufficient in the charge respecting defendant Pepe to convey adequately to the jury the standards to be applied in testing the admissibility of D'Alba's confessions, without the necessity for the requested additional instructions.

But as already indicated, the Court's entire charge on the issue of the admissibility of the confessions was woefully inadequate. (See People v. Everett, 10 N.Y.2d 500, 225 N.Y.S.2d 193, 180 N.E.2d 556 and People v. Vargas, 7 N.Y.2d 555, 200 N.Y.S.2d 29, 166 N.E.2d 831, supra, for illustrations of the proper scope of instructions on the admissibility of inculpatory statements.) Hence, such inadequate instructions can hardly serve as a proper crutch upon which to rest a contention that they should be extended by implication to excuse the refusal to charge the specific request of defendant D'Alba as to the standards to be applied to the resolution of the issue of the voluntariness of his alleged confessions.

Appendix B

In an attempt to minimize the prejudicial effect of the error in instructing the jury, the majority questions whether there was any issue as to the voluntariness of D'Alba's confessions. Primarily, it would seem that the extensive examination on the *voir dire* should dispel any such contention. Secondly, it was for the jury, under proper instructions, to resolve that question. Surely it was solely for the jury to determine which was true—D'Alba's confessions, his testimony before the grand jury or his testimony at the trial. He contended, at the trial, that his confessions and his testimony before the grand jury were untruthful, and were induced by fear of the consequences that would ensue if he did not make the inculpatory statements and similarly testify before the grand jury. It was for the jury, and not this Court, to draw conclusions as to the voluntariness of the confessions from the claimed similarities between D'Alba's testimony at the trial and the extra-judicial statements. The defendant Pepe did not testify at the trial or on the *voir dire* but he, too, contended that his confessions were induced by fear. Certainly, we may not, on this record, treat the very crux of the defense as not even rising to the dignity of a triable issue.

There was a crucial and substantial issue of fact presented on the *voir dire* as to whether the confessions were voluntary. In effect, the resolution of that issue amounted to a trial within a trial. If the jury found that the confessions were not voluntarily made, then a substantial portion, if not the entire case, of the People would be destroyed.

Therefore, both defendants were entitled to have the jury instructed at length and in detail as to the nature of a confession, the burden of proof, the duty to determine the credibility of the witnesses on the *voir dire*, their province to decide whether the confessions were freely and voluntarily made, and what "free and voluntary" meant. De-

fendants were also entitled to instructions that if the jury concluded that a confession was made as a result of fear—or if the jury entertained a reasonable doubt on that subject, irrespective of whether the confession was true—the jury were obliged to reject such a confession and not to consider it in their deliberations. Finally, there would also have to be explicit instructions that if the jury found a confession was voluntarily made, then they would have to determine whether it was the truth and whether there was other evidence to corroborate the confession.

The majority opinion of this Court reluctantly concedes that "a more careful treatment" of the instructions as to the confessions "would have avoided the appearance of error" and that a "charge phrased in the language of People v. Vargas, 7 N.Y.2d 555, 200 N.Y.S.2d 29, 166 N.E. 2d 831, could well have been given". Moreover, the majority would relegate the inadequacy of the charge and the refusal to give the requested additional instructions to the status of a deviation from faultless judicial technique rather than substantial error. I cannot accede to such depreciation of an error of constitutional dimensions to an inconsequential judicial peccadillo.

Finally, even though apart from the confessions, there may be other proof in the record of the guilt of defendant D'Alba, the error as to the faulty instructions cannot be disregarded. We cannot speculate as to what credit and weight the jury gave to the confessions. (See People v. Donovan, 13 N.Y.2d 148, 153, 243 N.Y.S.2d 841, 844, 193 N.E.2d 628, 630.) As to defendant Pepe, the exclusion of the confessions would have entitled him to an acquittal. It was thus essential that the jury receive proper and adequate instructions to enable them to perform their function in arriving at a conclusion as to voluntariness.

The failure of the Trial Court to charge adequately on the matter of the confessions in this case was prejudicial error, as a matter of law. The judgments of conviction as to each defendant should therefore be reversed and a new trial ordered.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 2 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 1201

LUCIO J. PEPE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	3
Crime and Discovery	3
Trial	5
The Original Appeal to the Appellate Division	6
The Original Appeal to the New York Court of Appeals	7
The *Jackson-Denno* Hearing	7
The Second Appeal to the Court of Appeals	8
The Evidence as to Petitioner's Statements	9
July 19, in Pepe's room	10
July 25, at the Department of Education	21
August 9, at the District Attorney's Office	24
Other evidence	27
ARGUMENT	
POINT I—The hearing court's finding of voluntariness, under traditional tests, is amply supported by the record	28
POINT II—The newly expanded application of the Fifth Amendment in *Garrity* v. *New Jersey* does not apply to petitioner's statements	35
(a) This case is distinguishable from *Garrity* on the facts	36
(b) *Garrity* v. *New Jersey* should not be applied retroactively	38

PAGE

POINT III—Petitioner's challenge to the fairness of the hearing was not passed on by the Court of Appeals, and is without merit 41

CONCLUSION 43

APPENDIX—Opinion of the Hearing Court A1

TABLE OF AUTHORITIES

Cases:

Escobedo v. Illinois, 378 U. S. 478 (1964) 6, 7

Garrity v. New Jersey, —— U. S. ——, 17 L.Ed.2d 562 (1967) 35, 36, 37, 38, 39, 40, 41

Griffin v. California, 380 U. S. 609 (1965) 39, 40, 41

Jackson v. Denno, 378 U. S. 378 (1964) 2, 6, 7, 42

Johnson v. New Jersey, 384 U. S. 719 (1966) 39, 40

Malloy v. Hogan, 378 U. S. 1 (1964) 39

Miranda v. Arizona, 384 U. S. 436 (1966) 39, 40, 41

People v. Huntley, 15 N.Y.2d 72 (1965) 2, 7, 42

People v. Laino, 10 N.Y.2d 161 (1961) 31

Rogers v. Richmond, 365 U. S. 534 (1961) 33

Spano v. New York, 360 U. S. 315 (1959) 32

Spevack v. Klein, —— U. S. ——, 17 L.Ed.2d 574 (1967) 35, 36

Stevens v. Marks, 383 U. S. 234 (1966) 41

Tehan v. Sholt, 382 U. S. 406 (1966) 39, 40

United States *ex rel.* Daniel v. Wilkins, 292 F.2d 348 (2d Cir. 1961), *cert. denied* 372 U. S. 917 (1963) 32

Statutes:

N. Y. Educ. L. §225(4), (5), (6) 2, 3

N. Y. Penal L. §580 ..... 2, 3

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No. 1201

LUCIO J. PEPE,

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the New York Court of Appeals entered December 29, 1966, affirming, without opinion, an order of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered April 26, 1966, affirming without opinion an order of the Supreme Court, New York County, entered July 1, 1965, amending, after a hearing as to voluntariness of a confession, a judgment of that court rendered January 4, 1963, convicting petitioner, after trial,

on five counts of unlawful acts in respect to examinations [N. Y. EDUC. L. §225(4), (5), (6)] and one count of conspiracy to commit such crimes [N. Y. PENAL L. §580]. Petitioner Pepe was sentenced to three months' imprisonment on the conspiracy count, and to a suspended sentence on the remaining charges, and is presently at liberty on bail pursuant to a certificate of reasonable doubt issued by a Justice of the Supreme Court, New York County, on January 7, 1963, and a stay of execution of sentence ordered by Mr. Justice HARLAN on February 6, 1967.

The judgment of conviction was affirmed by the Appellate Division on July 2, 1964 (VALENTE, J., dissenting) [21 A. D. 2d 417, 251 N. Y. S. 2d 209]. Appeal having been taken to the Court of Appeals, on January 14, 1965 that Court ordered determination of the appeal withheld [15 N. Y. 2d 764, 257 N. Y. S. 2d 337], and remitted the case to the trial court for further proceedings pursuant to *People* v. *Huntley* [15 N. Y. 2d 72 (1965)] and *Jackson* v. *Denno* [378 U. S. 378 (1964)]. Accordingly, a hearing was held in the trial court as to the circumstances relating to petitioner's confessions, and the trial court held the statements voluntary and admissible. The judgment as so amended was then affirmed on appeal. The instant petition relates only to the hearing on voluntariness, and other matters respecting petitioner's incriminating statements.

A co-defendant, Pietro D'Alba, was convicted of the same charges at petitioner's trial, and participated in the state appellate proceedings. He received a suspended sentence. D'Alba is not a party to this proceeding.

Statement of the Case

Crime and Discovery

Petitioner, Lucio J. Pepe, a licensed New York physician, and Pietro D'Alba, a candidate for the practice of medicine in New York, have been convicted on one count of conspiracy [PENAL L. §580] and five counts of unlawful acts in respect to examinations [EDUC. L. §225(4), (5), (6)], on proof of their participation in a plot to sell to other candidates questions and answers for the June, 1961, New York State Medical Board Examination, before the examination. The scheme was initiated in March, 1961, when the questions for the forthcoming June examination had been composed by the Board of Medical Examiners, and were in the custody of the Examination Editor in Albany, pending editing and printing. At that time, Dr. Stiles Ezell, Secretary of the Board of Medical Examiners, obtained from the Examination Editor, under the guise of routine editorial inquiries, the questions for the June examination (134-6, 173, 208, 210, 252, 353-4).* Ezell transmitted a handwritten copy of the material to petitioner Pepe, at a meeting in the street in New York City (512, 1554-5, 1582-5, 1592-6, 1600-3, 1606-7), and Pepe gave the material to Dr. Luigi Baviello, a practicing New York physician (1559-60, 1575). Pepe and Baviello agreed to sell the questions for $20,000 (504-5, 634-9), and share

* References, unless otherwise noted, are to pages of the typewritten minutes of trial. These minutes were part of the record on appeal to the Appellate Division and the Court of Appeals on the original appeal from judgment. They were introduced at the post-trial hearing on voluntariness as People's Exhibit 2. References marked "H." are to pages of the typewritten minutes of the post-trial hearing and exhibits at the hearing.

the receipts with Ezell (437-8, 500, 634, 641-2, 652-3, 1569-70, 1605-8).

Baviello enlisted D'Alba, who was taking a review course in preparation for the examination. D'Alba agreed to get the money from other candidates in the course (439-42, 504, 597, 599, 603-5, 1624-9, 1654-8), and he solicited several candidates, in order to raise $2500 from each (1630-3, 1664-8, 1702-5, 1731-2, 1751, 1865-6, 1901, 1910-13, 1929, 1981, 1986-7). Shortly before the examination, D'Alba gave Baviello $10,000 for four copies of the questions and answers of the first part of the exam, and was "guaranteed" that the money would be returned if the questions were not correct (509-10, 608). Petitioner Pepe received $5000 from Baviello (510-11, 1568), and gave $1000 to Ezell (H. 115-16, 150).

Just before the examination was administered, however, Ezell reported to Pepe that the exam had been withdrawn in Albany, and another substituted (1570-1, 1575-7, 1604). Pepe warned Baviello that the scheme had been discovered (511). Baviello contacted D'Alba (511, 1636-7), and D'Alba cancelled the deals with his customers (1700, 1704, 1785, 1872, 2059). The money was returned, and the contraband material collected (511, 1568-9, 1637, 1872, 2065) and guiltily destroyed (520, 1639-40).

In the meantime, the New York State Department of Education, joined by the State Police, investigated the scandal, questioned candidates who had been offered the questions (1706-15, 1807-10, 1915-18, 1954, 1957-8), and learned the identities of some of the participants. The investigators spoke to D'Alba on several occasions. Peti-

tioner Pepe substantially revealed his participation to the investigators at a stenographically recorded interview in his room on the evening of July 19, 1961 (1539, 1554-87; H. Exh. 3), and repeated the statement in greater detail the following week at the Department of Education (1588-96, 1600-8; H. Exh. 4). Two weeks later, on August 9, he gave the same statement to the district attorneys, after being warned of his rights (H. Exh. 7).

Trial.

On August 29, 1961, Pepe, D'Alba, and Baviello were indicted for conspiracy and various crimes in violation of Section 225 of the Education Law. Defendant Baviello pleaded guilty to several charges, and petitioner and D'Alba proceeded to trial.

The People's witnesses at trial included administrative personnel of the Department of Education, who described procedures with respect to the state medical examination, and who established the technical elements of the crimes; co-defendant Baviello, who established the participation of Pepe and D'Alba; four candidates for the June, 1961, examinations, who set forth D'Alba's solicitations, and one of whom, Dr. Gasto DeCarlo, described the substantial identity of the questions on the originally scheduled June examination (People's Trial Exhibit 1) and the material supplied by D'Alba; and stenographers and investigators, who described the defendants' confessions.

These incriminating statements were the subject of an extensive voir dire on the issue of voluntariness; petitioner did not testify. The issue was submitted to the jury, over

the objection that the statements were coerced by threats and exploitation of petitioner's alleged difficulty with the English language.

Petitioner and D'Alba were found guilty on all counts submitted to the jury (3064).

On January 4, 1963, petitioner was sentenced to a three-month term of imprisonment on the conspiracy count, and suspended sentences on the five other counts (min. of Jan. 4, 1963, p. 14).

The Original Appeal to the Appellate Division

On the appeal from judgment to the Appellate Division, First Department, petitioner leveled many attacks on the judgment, including contentions that his confessions were coerced, and that the court mischarged the jury as to the standard of proof of voluntariness. The Appellate Division, *per curiam*, dismissed all of these claims as insubstantial, except the challenge to the trial court's instructions as to the voluntariness of the confessions. Upon review of the instructions and the facts, the Court held, 4-1, no error in the instructions. Justice VALENTE, dissenting, believed the challenged instructions inadequate. Neither opinion discussed *Jackson* v. *Denno* [378 U. S. 378 (June 22, 1964)] or *Escobedo* v. *Illinois* [378 U. S. 478 (June 22, 1964)], which were decided after oral argument in the Appellate Division (May 15, 1964), and before the order of affirmance (July 4, 1964).

The Original Appeal to the New York Court of Appeals

On appeal to the Court of Appeals, petitioner abandoned almost all of his previous arguments, turned to the recent decisions in *Jackson* v. *Denno, supra,* and *Escobedo* v. *Illinois, supra,* and contended, among other grounds, that he was entitled to a new trial on all issues, including voluntariness and guilt or innocence; and that *Escobedo* rendered his statements to the Department of Education investigators inadmissible, because no counsel was present and no warning of the right to remain silent was given when the statements were made. After the appellate briefs had been filed, and shortly before oral argument (Jan. 12, 1965), the Court of Appeals rendered its decision in *People* v. *Huntley*, 15 N. Y. 2d 72 (Jan. 7, 1965), authorizing post-trial hearings on voluntariness in cases tried before *Jackson* v. *Denno*. On January 14, 1965, the Court of Appeals entered the following decision in the instant case [15 N. Y. 2d 764, 257 N. Y. S. 2d 337]:

> "Determination of the appeal withheld and case remitted to the Supreme Court, New York County, for further proceedings consistent with the decision in People v. Huntley, 15 N. Y. 2d 72, 255 N. Y. S. 2d 838, 204 N. E. 2d 179, decided by this court on January 7, 1965.
>
> "All concur."

The *Jackson-Denno* Hearing

Pursuant to the direction of the Court of Appeals, a hearing was held in the Supreme Court, New York County, before the trial judge, fully exploring the circumstances re-

lating to the defendants' incriminating statements. The trial record was presented to the court, in accordance with the *Huntley* decision; several of the witnesses at trial testified; additional witnesses appeared; and complete transcripts of the defendants' stenographically recorded statements were introduced. Petitioner did not take the stand. The trial court found his statements voluntary beyond a reasonable doubt, and admissible, and by order entered July 1, 1965, amended the judgment to reflect that finding.*

The Second Appeal to the Court of Appeals

On appeal to the New York Court of Appeals, petitioner contended that his statements were coerced by threats and promises, and that he was deprived of his right to counsel and his privilege against self-incrimination, particularly since he was not advised of the latter rights during the questioning. Respondent argued that the evidence at the hearing added nothing substantial to the evidence that was adduced at trial, except for new facts confirming the voluntariness of the statements. Hence, no cause had been shown for altering the findings that the petitioner's statements were properly obtained.

The petitioner also challenged the fairness of the post-trial hearing on voluntariness.

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* The opinion of the trial court accompanying the order is reproduced in the Appendix, *infra,* for the convenience of this Court.

The Evidence as to Petitioner's Statements*

The content and circumstances of various statements of petitioner Pepe were the subject of testimony of several witnesses at trial, including:

Howard Rice, an investigator with the Division of Professional Conduct of the New York State Department of Education for fourteen years, previously a member of the State Police for fourteen years (1168), six feet one inch tall (1354-5);

Investigator **John Cronin**, a member of the State Police for sixteen years (1042), six feet two inches tall, 188 pounds (1118);

Howard Picard, an investigator with the Department of Education for seventeen years (766-7), formerly with the State Police for fourteen years (782, 793, six feet tall, two hundred pounds (783);

August Bardo, Jr., Director of the Division of Professional Conduct of the New York State Department of Education (968), a member of the New York Bar for fifteen years (969), an investigator with state agencies for fourteen years (994), six feet four inches tall (1010), 220 pounds (1011);

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* The summary that follows covers all of the relevant evidence adduced at the post-trial hearing. Since much of that evidence consisted of the testimony at trial, submitted to the hearing court in the lengthy trial minutes, People's Hearing Exhibit 2, the trial testimony relating to the petitioner's statements is summarized herein, for the sake of clarity and for the convenience of the Court.

The additional evidence adduced at the hearing is included at the appropriate places in the summary, and is distinguished by the notation "H." signifying references to pages of the hearing transcript and the hearing exhibits.

Arthur Velcoff, formerly a hearing reporter with the New York State Department of Education (707-8, 808-9).

At the post-trial hearing, Messrs. **Rice**, **Cronin** and **Picard** testified again. Additional witnesses at the hearing were:

Assistant District Attorney **Jerome Kidder**, Chief of the Frauds Bureau of the New York County District Attorney's Office;

Assistant District Attorney **William J. Jones, Jr.**, member of the Frauds Bureau of the New York County District Attorney's Office;

Alfred H. Pockrass, Secretary to the Council on Accountancy of the New York State Department of Education, who participated in the investigation in the instant case;

Stiles D. Ezell, M.D., formerly Secretary to the New York State Board of Medical Examiners.

July 19, in Pepe's room

Arthur Velcoff testified at the trial that on July 19, 1961, he took down a statement of Dr. Lucio Pepe (707-8, 713-14, 722-4). The statement was at Pepe's home (729), across the street from Brooklyn Doctor's Hospital (730). Present were the hearing reporter, Pepe, Bardo, Picard, Cronin, who was not in uniform, Dr. Luigi Baviello (728), and Alfred Pockrass (730, 731). The interview lasted from 6:15 p.m. to 8:05 p.m. (737-8). During this time, Picard and Pepe left the room on one occasion (738, 740, 742-3).

At trial, portions of the transcript of the interview with Dr. Lucio J. Pepe, on July 19, 1961, at Pepe's living quarters in Brooklyn, were read to the jury (1539-87, 1609-18). At the post-trial hearing the entire transcript was introduced (H. 8; Exh. 3). Pepe was sworn by the hearing reporter, a notary public, and the purpose of the examination was explained to him (1539-41). He claimed not to know whether people were aware of the June examination questions in advance (1541, 1544). According to Pepe, in March Pepe found some notes on the subway train, and thought "maybe this will be the question," because in his school they had the examination questions for the last few years (1544-5, 1547). Mr. Bardo interrupted, asked Pepe not to commit perjury, and advised Pepe to listen to Dr. Luigi Baviello, with whom the investigators had spoken (1547). Baviello, who was present at the interview, told Pepe, "I said that I got the questions from you and you got the questions from Ezell" (1547). Howard Picard then summarized the investigation, and concluded: "* * * Now, please, Doctor, you're under oath, don't further compromise this thing. Look, we're interested in the man you got the question papers from. We're mainly interested in him. We want to clean our own house. We do not want to cause you * * * any more trouble than we have to. If we have to do it the hard way, you're going to the grand jury. Now, why don't you be honest with yourself and tell us the story honestly and openly" (1548). Nevertheless, Pepe repeated his disclaimer (1548-9), while Bardo asked "Why get yourself in any deeper?" (1549).

Picard and Bardo then asked whether Pepe wanted to lose his medical license (1609). "All right," said Picard,

"then cooperate with us and tell us the truth about this thing, because all we want is your cooperation so we'll know what course of action to follow. Now, if you don't help us, necessarily, we're going to involve you, but deep" (1609-10). When Pepe insisted that he did not understand "the reason" or "the way" he would be involved (1610), Picard suggested that certain telephone calls had been traced. "We know a lot of things, Doctor. You're committing perjury. You're under oath. This is perjury you could be sent to jail for. Don't do it, please. Tell us what you know" (1610). Pepe still affirmed his original story (1551-2), adding that he had given the notes, which were handwritten summaries of questions, to Baviello (1549-50), but denying that he had told Baviello to sell them (1550).

At this point, Picard asked Dr. Baviello whether he had told the investigators that Pepe had given him the question papers, which Pepe had received from someone in Albany, and that Baviello had paid Pepe $5,000. Baviello confirmed having reported this. When Dr. Pepe nevertheless asked, "Who gave me $5,000?" Baviello said, "I think at this point, it's better to clarify everything, so we clarify, they will clarify, and maybe they will help us" (H. Exh. 3, pp. 9-10). "Your intelligence should tell you, Doctor," Picard continued, that we're primarily interested in cleaning our own department * * *. Lacking your cooperation, we're going to have to follow some other course of action. That's only natural." He reviewed the extensive investigation, and the evidence obtained from Baviello, other doctors, and the telephone records, and concluded, "I plead with you, don't perjure yourself" (1611-12). "If you don't tell us the truth," said Pockrass, "you may find

yourself before a grand jury, and perhaps facing a criminal indictment, instead of merely departmental action here" (1612). Picard added, "Do you want to go to State Prison? Then tell us the truth" (1612). Bardo also advised Dr. Pepe that they knew the truth. "What are you going to be a sucker for and take it all yourself? Right now it looks as though you got the questions. How did you get them? You got them from somebody. You had better get rid of this thing. Don't keep it all—" (1612). Picard interceded, "Who's going to believe you picked them up on the train? Tell us the truth" (1613). Pepe repeated that he had gotten a "general idea," not questions (1613), and insisted that he had already told where he had obtained the material (1551).

"No," said Bardo. "You better come forward; if you don't, you're a dead pigeon" (1613). Picard asked whether Pepe was "going to take this whole thing all by yourself" (1613). Dr. Pepe, however, again denied getting help from or covering up for Ezell, and said that he had already told the source (1551-2). "If you're back to finding them on the train," said Bardo, "we're not buying it. You're getting yourself in up to here (indicating neck region). Keep going" (1613).

Recalling that an hour earlier Baviello had telephoned Pepe to tell him that they were coming over to question him about the examination, Mr. Pockrass asked whether Pepe had visited an attorney during that hour. Pepe stated that he had gone on a house call, and that he didn't know the name of a lawyer (H. Exh. 3, pp. 13-14). John Cronin of the State Police then spoke to Pepe, reminding

him that the other gentlemen "want to clean their house up in Albany," and advising that no one would believe his story about finding notes on the subway. "Now, nobody's going to believe it, and if you go before that grand jury you'll have your picture in the paper; you'll be so damn embarrassed and you'll wind up losing your license here, and in Italy, because these gentlemen will see to it" (1613-14). "You'll wind up with nothing," added Bardo. "I'll guarantee that" (1614). Cronin continued, "Your only hope is to come truthfully," and he pointed out the "substantiation" that the investigators had, but Pepe insisted "It's the truth" (1552, 1614), and claimed that he had talked to Dr. Ezell once, in 1958. Picard said, "Doctor, all we want is the information from you; then we're going to leave you here and go on about our business." "My dear sir, this is what I have said," Pepe insisted. "I have nothing to say more" (H. Exh. 3, pp. 15-16). He persisted in his denials, although Baviello described the details of their financial transaction, including the return of the money after Ezell called to say there was a switch in the examination (H. Exh. 3, pp. 16-20).

Picard referred again to the grand jury, and warned Pepe that he was putting himself and Baviello in jail (1615). "We made the mistake," said Dr. Baviello, and he advised Pepe to "clarify" everything; "if we say the truth, maybe they will help us" (1615). Picard assured Pepe that they would, but not if Pepe did not want to help himself (1615). "You're a sucker to go it alone," interjected Bardo (1615). Picard urged Pepe to "narrow the path" that they followed, and repeated that the investigators were "mainly concerned with our own family, the

people in Albany" (1615). Pockrass asked whether Pepe got the notes from a woman doctor, and whether a woman doctor was a friend of his, and Pepe said no (H. Exh. 3, p. 21). Then Picard asked Pepe to tell what he could. "We'll forget about the rest of it. You're going to have to trust us, Doctor." He urged Pepe to use his intelligence and make the best of an "embarrassing position." "You don't have to be afraid of anyone up in Albany; that's our department; we'll take care of that" (1615-16). Asked whether he was "afraid," Pepe answered "No. For what? Why?" (1553). Bardo assured Pepe that no one would harm him "physically"—a word that Dr. Pepe professed not to understand (1553, 1616)—and Bardo repeated that Pepe was making a big mistake to "take it alone" with Baviello (1616). Pockrass pointed out that no grand jury would believe Pepe's story about the train, and pointed out that they were "trying to straighten out the facts in the case so we can make sure that all examinations in the future are honest, without the necessity of the intervention" of a grand jury. He reminded Pepe that his friend Dr. Baviello had "flatly contradicted" him. Pepe stuck to his version (1616-17).

At this point, 7:35 p.m., Picard asked Pepe and Baviello to come out in the hall for a minute. "Anything you say" said Pepe. They left the room, returned in about ten minutes (1617), and Picard announced that Pepe had acknowledged receiving $5000 from Baviello, and returning it the next day. "He wants to tell the truth. He wants the break." "This is the truth, this is the truth," insisted Pepe (1554).

Questioned thereafter by Bardo, Picard, and Pockrass, Pepe explained that Ezell had given him certain handwritten material (1581), "the approximate idea" of the questions, in May, 1961, in the street in New York (1554-5, 1582-3, 1585), telling Pepe that this was "probably" the questions, or the "general idea" (1557), in case Pepe had some friends who were eligible for the exam (1555, 1557, 1586). Ezell asked for no money at any time (1558-9). Pepe gave all the material to Baviello, also without asking for money (1559-60, 1575).

At this point in the interview, Baviello stated that he and Pepe had agreed to $20,000, but Pepe contradicted him (1565-6). According to Pepe, Baviello's suggestion of $20,000 was too high, no price was set, and they were to accept whatever money they could get, if any (1567). Shortly before the exam, Baviello came to Pepe with $5,000 (1568). Pepe placed it in his dresser, intending to give some to Ezell (1569-70), but he gave it back to Baviello the next day (1568-9), after Ezell called him and told him that the exam had been switched (1570-1, 1575-7). After a discussion off the record (H. Exh. 3, p. 35), Pepe said that he did not know Dr. Pietro D'Alba (1580).

Pepe also denied having any "help" when he passed the medical examination in December, 1960 (H. Exh. 3, p. 37); he was in touch with Ezell only once, except for a previous meeting for his "eligibility" (*id.* at 38). When Ezell gave him the material on the street corner no one was present, neither doctor, attorney nor politician (*id.* at 46).

At the close of this interview, Bardo said that the investigators would do everything possible to take into consideration Pepe's cooperation, would bring this to the attention of the proper authorities, and would "tell them that you've been helpful, for their consideration" (1617-18).

Howard Picard testified that Pepe expected the investigators when they came to his room, because he was called by Baviello about an hour before (792).

The interviewers told Pepe that he was under oath, and warned him not to perjure himself, because they were seeking the truth, not necessarily because they wanted Pepe to believe that he would be prosecuted for perjury if he did not answer (770-1). In telling Pepe, "You don't have to be afraid of anyone in Albany. That's our department. We'll take care of that" (786-7) [1615-16], Picard was making no promise, but merely assuring Pepe that he need not worry about reprisals from the person in the Albany office who was also involved (787). Picard said at one point that all that the investigators wanted was the information from Pepe, "then we are going to leave you here and go on about our business" (774). This was not a promise that his license would be safeguarded, but a statement that the visitors would only "tie him up long enough for him to tell what he had to say" (790).

Toward the end of the interview, Picard invited Pepe and Baviello out of the room; the three men left the room, and had a ten-minute conversation on the porch (776-8, 787)

[1617]. In this conversation, Picard pointed out that information indicated that Pepe was involved. He attempted to persuade Pepe, through Baviello's presence, that he was not misquoting Baviello. Picard said that they were interested in finding out who in the Department was involved, and he asked Pepe for his cooperation (H. 35, 49-50). During the conversation, Baviello confirmed having told about Pepe's role (H. 49, 59). Pepe admitted that he had received $5,000 from Baviello for question material, that Ezell had given him the material, and that he had later returned the money to Baviello. He asked for consideration. Picard told him that he could promise nothing, but would make a report of Pepe's cooperation, for whatever consideration the proper authorities might want to give it (H. 37, 38, 52). Picard made no promise to Pepe on the porch, and said nothing about giving him a break or a deal (784, 785). When they came back into the room, Picard reported Pepe's admissions and his professed desire to tell the truth, and said "He wants the break" (785, 787-8) [1554]. The latter remarks referred to Pepe's request for consideration in return for his cooperation (H. 38-9).

Picard did not raise his voice during the examination (781), was not "stern" (782), suggested no physical violence at any time, and never threatened Pepe (783). Picard did not tell Pepe that he could refuse to answer questions (794, 798; see also **Pockrass**: H. 204), or that he could consult with counsel (H. 36; see also **Pockrass**: H. 204), but Pepe never declined to answer a question (799). Picard knew during the interview that Pepe came from Italy, and had a "language speech impediment" (794-5).

Arthur Bardo, Jr. testified that he participated in the examination of Dr. Pepe in Pepe's room (986-7, 989). The room was small, about nine feet by ten or eleven feet (989, 1003).

Bardo explained various statements that were made during the interview. At one point, Bardo said to Pepe, "Why get yourself in any deeper?" (990) [1549], meaning under a greater suspicion (990-1). He did not want to worry Pepe, but to persuade him to tell all he knew (990, 991). Shortly thereafter, Picard and Bardo asked whether D'Alba wanted to lose his license (991-2) [1609]; again, Bardo meant that Pepe would best tell the truth (992, 993). During the interrogation, the interviewers spoke in succession, without answers from Pepe; the questions flowed naturally, and there was no intent to work as a "team" or deprive Pepe of a chance to answer (999, 1007). When Bardo said, indicating his neck region, "You are getting yourself in up to here" (1012-13) [1613], he intended to discourage Pepe from lying, because Pepe was under oath (1910-14). When Bardo said, "You will wind up with nothing. I will guarantee that" (1015-16) [1614], his purpose was to assure Pepe's understanding that his telling the truth was desirable, and that he should not perjure himself in the sworn statement (1017). Pepe persisted, so Bardo asked whether he was "afraid," to determine whether there was a reason for Pepe's recalcitrance, not to suggest fear (1019-21) [1553, 1616]. Bardo told Pepe that no one was going to harm him "physically," to reassure Pepe that if he had any fear on the outside, it was groundless, since no one could physically harm him for telling the truth (1022-4) [1553, 1616].

At the end of the interview, Bardo told Pepe that he would do everything he could to take into consideration Pepe's cooperation (1027) [1617-18]. No separate communication devoted to this matter was directed to the Department of Education or the District Attorney's Office, but Bardo's comment and Pepe's statements were transmitted to those agencies as part of the transcript of the interview (1027-9).

Bardo also testified that the investigators did not intend to frighten or threaten Pepe (999-1000, 1002-3, 1006, 1008-9), or to make him feel "closed in" (1003, 1006). In Bardo's years as an investigator, he and his Department never traded on fear, and as a lawyer he abhorred the use of fear (994-5, 997).

John Cronin testified that in Pepe's one room, which was small, were a bed, two chairs, and a dresser (1118-19). During the examination, Cronin spoke in a normal tone (1127, 1131). When Cronin referred to the grand jury, and said to Pepe "You'll be so damn embarrassed and you'll wind up losing your license here, and in Italy, because these gentlemen will see to it" (1131) [1613-14], Cronin's purpose was to get the truth, by frightening Pepe (1134-5, 1136). Cronin did not know, however, whether the other investigators had the power to make trouble for Pepe, or whether they intended to do so (1135). It was possible that he had discussed these consequences with them, but he did not recall such a discussion; that was something he "made up" (H. 188-90). Pepe was sitting on the bed when Cronin spoke. He did not look afraid (1129, 1136). At the time of the interview, the investi-

gators were more interested in the people in Albany, where the papers had come from, than the people in New York (1137).

July 25, at the Department of Education

At trial, portions of the transcript of the **examination of Dr. Pepe on the afternoon of July 25, 1961**, at the offices of the New York State Department of Education (722-3), were read to the jury (1588-96, 1600-8). At the hearing, the entire transcript was placed in evidence (H. 11; Exh. 4). Present at the interview, in addition to Pepe and the stenographer, were Messrs. Picard, Pockrass, Rice and Cronin, and Mildred Henyon, the Examination Editor (1589). Pepe repeated his previous statements with respect to the receipt of the materials from Ezell, and the transfer to Baviello, except that he now placed the meeting with Ezell in late April or early May (1592-4, 1606-7). According to Pepe, he originally called Ezell with respect to an error in his diploma, and the eligibility of a friend. To Pepe's surprise, Ezell offered him the material (1595-6, 1600-3), which Pepe did not read (1594-5). It was Baviello's idea to get money for the material (1605-8); Pepe was not sure whether Baviello gave him $8,000 or $10,000 (1605). Pepe spoke to Ezell last on June 23, when Ezell called from Albany to say that the examination was being switched; he had not spoken to Ezell since the interview on July 19 (1604). When Pepe said this, Picard reminded him, "you know what we're going after; we're not interested in you so much as we're interested in the guy up in Albany" (H. Exh. 4, p. 25).

Most of the interview on July 25, the transcript shows, was not set forth before the jury. The portions not read to the jury related primarily to the question whether Pepe's grades on the 1960 medical examination were improperly raised to a passing mark (H. Exh. 4, pp. 5-6, 9-25, 29-37).

In this discussion, Pepe acknowledged that he had taken the licensing examination four times, passing the last time, in December 1960 (*id.* at 9, 17). He denied speaking to Ezell about reviewing the fourth test (*id.* at 10), later acknowledged that he had asked Ezell for "help" after the examination (*id.* at 15-16, 19-22), although Pepe claimed that his request was made before he learned of his grades (*id.* at 16-17, 22). He apparently evaded questions as to who had advised him to contact Ezell (*id.* at 21). Pepe asserted that the failing marks reflected on his December 1960 test paper, which was shown to him during the interview, were a surprise to him (*id.* at 10-12, 13-14, 18-20); he said "I don't know" when asked whether, and why, Ezell had raised his grades (*id.* at 11-13, 19, 32).

During the questioning about the raising of Pepe's grades, Picard urged Pepe to help the investigators in that matter, warning him to tell the truth or "we'll take your license away from you and put you out of business" (*id.* at 14-15); there was a strong possibility, he said, of Pepe's losing his license "because of fraud" (*id.* at 21). Picard also informed Pepe that there was a "strong possibility this thing may go to the grand jury," Pepe answering that he had "nothing to say about any possibility" (*id.* at 24).

Pepe repeatedly stated that he paid Ezell nothing for the June examination material or for raising his grades (*id.* at 22, 24, 26-7, 30-1, 37). When, toward the close of the interview, Picard told him that "Your story is incredible, Doctor," Pepe insisted "My story is perfect, 100 per cent" (*id.* at 33), and urged Picard, "believe me; like your son, this is the real truth * * *" (*id.* at 37). Thanked for "coming in," Pepe replied, "my pleasure" (*id.* at 36).

Howard Rice testified that on July 25 the investigators wanted to find the "leak" in Albany, by uncovering evidence in New York (1346-8). No one made threatening statements to Pepe (1338-9). When Picard said to Pepe [in discussing the raising of his grades], "We will take your license away from you. We will put you out of business" (1344), this was not a threat, but a "prod," to get Pepe to talk, and to "remember" things not "remembered" up until then (1344-5). In Rice's view, "A little bit of fear helps," and the purpose of such statements is to use fear to help persons to remember (1345). Pepe was not told during the questioning that if he cooperated, influence would be used to help him retain his license (1353). He was not advised of his right to remain silent or to speak to a lawyer (H. 227-8; see also **Pockrass**: H. 204-5).

Pepe appeared at the office without subpoena or other compulsory process, in answer to a telephone call (**Pockrass**: H. 207; see also **Rice**: H. 230).

August 9, at the District Attorney's Office

There was no evidence at trial relating to Pepe's visit to the District Attorney's Office on August 9, 1961. At the hearing, it was stipulated, by written instrument signed by Pepe and his attorney, that if Assistant District Attorneys **Kidder** and **Jones** were witnesses at the hearing, they would testify as follows concerning the interview (H. Exh. 7):

Mr. Kidder telephoned Pepe, and asked him to come to his office (H. Exh. 7, p. 1). [Appearing on the witness stand for cross-examination, Mr. **Kidder** explained that he called Pepe at the hospital, identified himself, and requested Pepe's presence at his office in connection with the investigation (H. 20, 28-9).] Pursuant to the request, Pepe appeared at the District Attorney's Office, where Kidder interviewed him, in Jones's presence (H. Exh. 7, p. 1; **Kidder**: H. 19). The interview lasted forty-five minutes or an hour (**Kidder**: H. 24).

Prior to the questioning, Kidder identified himself as an assistant district attorney, introduced Mr. Jones, and informed Pepe that they were investigating irregularities and possible criminal offenses in connection with the administration of the medical examinations and the issuance of medical licenses (H. Exh. 7, p. 2; **Kidder**: H. 25). He advised Pepe that the evidence indicated that some candidates' grades had been altered improperly, that copies of the examinations had been unlawfully made available to candidates in advance of the examinations, and that Pepe had been guilty of criminal conduct in these areas. The

district attorney, said Kidder, was conducting an extensive investigation into these matters, and would like Pepe's cooperation. Even if he cooperated fully, however, the evidence against him would have to be presented to a grand jury, and the grand jury would in all probability file criminal charges against him (H. Exh. 7, p. 2). But, advised Kidder, Pepe's cooperation would be called to the attention of the court at the time of sentence, and to any other official agency concerned, and the district attorney would recommend that the court and these agencies take Pepe's cooperation into consideration in determining what punishment, if any, should be imposed (*id.* at 3).

Kidder further advised that Pepe's decision whether to cooperate was a very serious matter involving his entire career, that he had a right to consult counsel before deciding, and that he could remain silent (*id.* at 3). [On the stand, Kidder confirmed these facts, and related that his notes on the interview did not reflect the admonitions (H. 19-20, 25-6).] Pepe said that he did not need, or did not want, a lawyer (**Kidder**: H. 26), that he was willing to cooperate with the District Attorney's Office, and that he would answer any questions (H. Exh. 7, p. 3; **Kidder**: H. 26).

Pepe then described his professional employment in the United States, beginning in 1953 (H. Exh. 7, p. 3); his initial contact with Dr. Ezell, which he placed in 1958 (*id.* at 4); his three failures on the medical examination; and his success the fourth time (*id.* at 4). He repeated his story of July 25 as to his conversation with Ezell after he took the fourth examination in December, 1960 (*id.* at 405).

As to the June, 1961 examination, Pepe admitted once more that his original claim of finding the notes in the subway was a lie (**Kidder**: H. 24); again acknowledged that in March or April he met Ezell on the street, where Ezell gave him material relating to the examination (H. Exh. 7, p. 5); still insisted that the material was only a general idea or "summary" of the examination (*id.* at 5, 7); and professed surprise at Ezell's conduct (*id.* at 5). Pepe again admitted giving Baviello the material. But now, contrary to his statements on July 19 and July 25, he asserted that there was no discussion with Baviello about selling the questions until June, when Baviello came to him and, to Pepe's surprise, reported the sale (*id.* at 6). Pepe also claimed now that Baviello gave him no money (*id.* at 7). He again admitted that Ezell had called him to report that the examination had been changed (*id.* at 6).

At the conclusion of the interrogation, Pepe was advised that the prosecutor would like him to appear as a witness before the grand jury, and that he would be asked to sign a waiver of immunity. The waiver was explained to him, and he was advised that he should consult an attorney before deciding whether to sign (*id.* at 7; **Kidder**: 24-5). During the interview, Pepe had some language difficulties, but he was able to express himself clearly, and he never asked for an interpreter. There were no threats, and no promises, other than the promise previously described (*id.* at 7). Pepe made no complaint of threats or promises from other persons (*id.* at 8).

After this meeting Pepe obtained a lawyer, who informed the prosecutors that Pepe would not waive immunity; consequently, Pepe was never called before the grand jury (*id.* at 7).

Other evidence

Stiles D. Ezell, M.D., Secretary to the Board of Medical Examiners during the events in question, testified that his medical license was revoked in 1964, when he was convicted on his plea of guilty of certain charges (H. 88-9, 122, 153). In late February, 1961, Lucio J. Pepe visited Ezell at his office at the Department of Education on 45th Street in Manhattan. During their conversation, Pepe asked whether Ezell could give assistance to some friends who planned to take the medical examination, and said that he would show Ezell his appreciation for the information (H. 94-5, 97, 101-2). In March, at a street-corner meeting on 45th Street initiated by Pepe, Ezell gave Pepe notes that he had prepared, covering the questions on all nine subjects for the forthcoming June medical examination (H. 102, 107, 111). In June, on the Thursday preceding the examination, which was scheduled to begin on a Tuesday, Pepe returned to Ezell's office and gave him $1,000 in cash (H. 115-16, 150). But on Sunday, at Grand Central Station, Ezell returned the money to Pepe, having informed Pepe that there was an investigation and the examination had been changed (H. 116-17, 151).

While Ezell was on the witness stand, the hearing court rejected the People's offer of proof that Pepe had paid Ezell for raising his examination grades (H. 90-1, 97-9, 114, 163, 187-8).

ARGUMENT

POINT I

The hearing court's finding of voluntariness, under traditional tests, is amply supported by the record.

Petitioner claims that under "traditional" tests of voluntariness, his statements were inadmissible. His claims of coercion were the subject of an extensive *voir dire* at trial. Pursuant to the mandate of the New York Court of Appeals, a comprehensive hearing was held in the trial court, at which the petitioner had full opportunity of presenting additional evidence relating to his statements. Although expanding his legal claims, he presented no new facts of importance. But the People, unfettered by the caution inherent in a jury trial, and able to clarify some points, produced significant additional proof of voluntariness. On all of the evidence, the hearing court found the petitioner's statements admissible. The Appellate Division and the Court of Appeals have unanimously affirmed. The record amply supports the hearing court's findings.

The primary facts were undisputed. Indeed, the facts relied upon by petitioner Pepe to show official overreaching, consisting of certain statements by the investigators, were reflected in the stenographically recorded transcript of the interview at his room. Although Pepe made no claim at trial, either by testimony, argument to the jury (2762-3, 2777, 2792-802) or requests to charge (3087, 3089, 3090-1) that his confessions were induced by promises of immunity, and he made no such argument on appeal from judgment, at the post-trial hearing he urged that interpretation of the

investigator's statements. Pepe also contended at trial, on the original appeal, and at the hearing that the interrogator's statements constituted coercive threats. He renewed both arguments on the State appeal after the hearing, and presents them again here. The record refutes him; under classical standards of voluntariness, no improper threats or promises were made.

It may be noted that before speaking to Dr. Pepe for the first time, on July 19, the investigators had gained significant information about the "leak." They had received statements from candidates that Pietro D'Alba gave them test material in advance, they had learned from D'Alba on July 18 that he got the papers from Baviello (1176, 1178, 1224, 1458-9), and they were informed by Baviello on July 19 (H. Exh. 3, pp. 4-5, 9) that his source was Pepe, who, said Baviello, claimed to have gotten the questions from someone in Albany (*ibid.*). Diligently pursuing the inquiry without delay, and entitled to believe that exposure of the major offender, a corrupt public officer, might be imminent, the investigators visited Dr. Pepe at his room near the hospital. Their association with him proceeded from the start in a noncoercive atmosphere. Baviello called Pepe an hour before the visit to announce their intention (792; Exh. 3, pp. 14-15). Thus forewarning Pepe, enabling him to prepare himself and consult others, the authorities pursued a course inconsistent with a desire to exert pressure. The interview began at a reasonable hour, 6:15 p.m., and occurred in familiar surroundings.

At the outset the purpose of the inquiry was forthrightly explained. Then Pepe was asked about his role

in the distribution of the material, and his source, and he gave his initial version: he found some notes in the subway, thought they might be questions for the examination, and gave them to Baviello, but he never told Baviello to sell them, and did not know whether any persons were aware of the examination questions in advance. In the course of this conversation, the investigators made certain allegedly coercive statements to Pepe about the possible prospects if he persisted in hiding the truth, including a prosecution for perjury (H. Exh. 3, pp. 5, 7, 10), inquiry by the grand jury, a prison sentence (H. Exh. 3, pp. 6, 10-11, 15, 20, 22-3), involvement "deep" (H. Exh. 3, p. 7), and loss of his license (H. Exh. 3, pp. 6-7, 15). While severe, these potential consequences were reasonably related to the situation. Pepe, a medical doctor licensed by the State, had apparently committed acts aimed at the heart of the integrity and safety of his profession, was brazenly lying and refusing to cooperate, and was obstructing the important task of discovering the source of the disclosures. Further, at the time of the statements Pepe was not under arrest, the prospects described were distant, and did not entail an immediate answer, and he was not prevented from leaving or communicating with others pending his decision. And Pepe was no timid, frightened suspect, but a mature, intelligent, cunning and well-educated professional man. He insisted that he was not afraid (1553; H. Exh. 3, p. 22), he showed no signs of fear (1129, 1136), and his responses to the visitors' conscientious questions were punctuated with arrogant, self-righteous protestations of innocence.

During the colloquy, the investigators also suggested that if Dr. Pepe told the truth at that time he might avoid

the grand jury (H. Exh. 3, p. 23), or face "merely departmental action" (*id.* at 10-11), and they made other remarks that apparently form the basis for Pepe's present claim of promises of immunity (*id.* at 7, 16, 22). But with these phrases in context, Pepe's interpretation is disproved. The remarks that Pepe incorrectly calls improper threats, discussed above, made it clear that the investigation concerned a criminal matter. The visitors explained that they knew he had "played" a "part" in the plot (*id.* at 5). While pointing out that their principal aim was to expose the "bad root" in Albany, the remarks that communicated this purpose showed that the investigators were also interested in Pepe (*id.* at 5, 10, 21). The thrust of their statements was that Pepe would be in "trouble" (*id.* at 6) even if he cooperated, and that he had to "make the best of it" (*id.* at 22). Further, they frequently advised Pepe not to "take it all" himself and "go it alone" (*id.* at 11, 12, 21); as Mr. Bardo said, "Why should you two fellows take it alone and let him go free?" (*id.* at 22). In urging Pepe in this manner to share his responsibility with the "man in Albany," the investigators hardly conveyed a promise of immunity, particularly since Pepe's confederate Baviello, who had already confessed, was designated as one of those who had to "take it." Baviello, who was also indicted, expressed the same interpretation of the investigators' intentions (*id.* at 9-10, 20-1). Thus, "in this instance, the record is clear," Pepe "was on the target even if perchance he was not to be the bull's eye" [*cf. People* v. *Laino*, 10 N.Y.2d 161, 170, (1961)].

After this conversation, at 7:25 p.m., Picard invited Pepe and Baviello to join him on the porch. "Anything

you say," agreed Pepe, and they left the room (1617). The ensuing ten-minute discussion, the turning point in Pepe's attitude, confirms that his incriminating statements thereafter were not the product of improper pressure. Pepe was faced with Baviello's renewed assurances that he had directly implicated Pepe in the conspiracy. It is impossible to see how this direct confrontation with Baviello's serious accusation could have "lulled Pepe into a false sense of security" (petition, p. 29). And such confrontation with evidence produced by independent investigation has consistently merited judicial approval [see *United States ex rel. Daniel* v. *Wilkins*, 292 F.2d 348 (2d Cir. 1961), *cert. denied* 372 U. S. 917, 950 (1963)]. Petitioner's comparison of his case with *Spano* v. *New York*, 360 U. S. 315 (1959) is unconvincing. In *Spano*, the defendant, a young man, was under arrest, was questioned for eight hours late at night in strange surroundings, and was repeatedly denied access to counsel, and a "false friend" of his in the police department persistently urged him to confess, misrepresented his own role and played upon the defendant's sympathies with false statements that if he did not confess he would jeopardize his friend's job and the welfare of his family. *Spano* did not hold that investigators may not use a suspect's friend to persuade him to reveal the truth. That circumstance, said the Court, was merely "another factor which deserves mention in the totality of the situation" on the issue of voluntariness [360 U. S. at 323]. In sum, the confrontation between Baviello and petitioner was proper.

Doubtless Pepe realized when Baviello spoke that the investigators' account of the evidence was no bluff, and that

no one would believe his patent lie about his source of the questions—a lie which, as Bardo had suggested, had already gotten him "in" up to his neck (1613). Pepe therefore acknowledged the essentials of Baviello's report, and named Dr. Ezell as the supplier of the examination material. But then the resourceful Pepe, not prone to part with valuable information for nothing, asked for "consideration." Picard replied that he could make no promises, but would report Pepe's cooperation to the proper authorities (784, 785; H. 37, 38, 52). When they rejoined the group in Pepe's room, Picard reported Pepe's wish for consideration by announcing that Pepe wanted the "break" (785, 787-8, 1554; H. 38-9). While Picard's phraseology on its face might conceivably be deemed somewhat cryptic, in the context of the previous discussion on the porch the meaning was clear, and not sinister. Picard's putting his comment on the record confirms that his motives were fair.

The investigators' and Pepe's behavior thereafter further proves that all parties, including Pepe, understood that possible consideration, not immunity from prosecution, was the only favor that Pepe could expect, and that his revelations were not the product of fear. While admitting substantially, upon his return to the room, his participation with Ezell and Baviello, Pepe reaffirmed his denials that he paid Ezell for the material, and he disclaimed any knowledge of the raising of his grades on the December 1960 examination. This persistence in exculpatory stories is strong evidence that his "will" was not "overborne" by the interrogators, and that his decision to give the other information was "freely self-determined" [see *Rogers* v. *Richmond*, 365 U. S. 534, 544 (1961)]. As to the "prom-

ise," at the close of the meeting the immediate director of the investigation, attorney Bardo, confirmed the parties' understanding:

> "We're going to do everything we can to take into consideration the fact that you've cooperated with us here, and, as I said to you, we're anxious to find out, di[g] this thing out by the roots. You've done your part, and we'll bring this to the attention of the proper authorities, and we'll tell them that you've been helpful, for their consideration" (1617-18; H. Exh. 3, p. 45).

Pepe expressed no dissatisfaction with this summary of the arrangement.

Six days later he went voluntarily to the office of the Department of Education, after ample opportunity for seeking outside advice and reflecting upon his situation, and without any threats or promises he repeated his statement (H. Exh. 4, pp. 2-9). In the remaining portion of the interview, he again denied paying Ezell for any purpose, or having his grades raised. Significantly, the latter denials were given after the investigators warned him that his license could be removed (*id.* at 14-15, 21), and that there was a "strong possibility this thing may go to the grand jury" (*id.* at 24), additional proof that the admissions of July 19, which followed similar warnings, were not the product of fear.

Bardo's promise of consideration, quoted above, was transmitted to the district attorney as part of the transcript of the interview (1027-9; H. 23-4). On August 9, Pepe went to the District Attorney's Office, and Mr. Kidder repeated the promise. On this occasion, he advised Pepe that he could refuse to talk, and, precluding any possible ambiguity in Pepe's situation, informed him that the

evidence indicated that Pepe had been guilty of criminal conduct in respect to the examinations, that even if he cooperated the evidence would be presented to a grand jury, and that in all probability he would be charged with a crime (H. Exh. 7, p. 2). Amplifying the prior promise, he stated that Pepe's cooperation would be called to the attention of the court at sentencing, and that the prosecutor would recommend to the court and other agencies that it be taken into consideration (*id.* at 3). Again, Pepe accepted this description of his status. Declining an opportunity to consult counsel (H. 26), Pepe reasserted his willingness to cooperate, and though minimizing now the financial aspects of the conspiracy, largely repeated his prior admissions.

In short, on the whole record, Pepe's statements reflected a deliberate choice whether to talk or remain silent; and the investigators' assurances of possible leniency if Pepe told the truth, given on July 19, were spoken in good faith, and expressed no promise of immunity.

POINT II

The newly expanded application of the Fifth Amendment in *Garrity* v. *New Jersey* does not apply to petitioner's statements.

Petitioner's principal claim is that apart from "traditional" standards of voluntariness, use at his trial in 1962 of his statements to the Department of Education investigators was precluded by this Court's recent decision in *Garrity* v. *New Jersey* [—— U. S. ——, 17 L.Ed.2d 562 (1967); see also *Spevack* v. *Klein*, —— U. S. ——, 17 L.Ed.2d 574 (1967)]. *Garrity* held the Fifth Amendment offended by obtaining incriminating statements from police

officers upon the threat that, pursuant to a state statute, their claim of the privilege against self-incrimination would subject them to discharge from office. Petitioner contends that the threat of loss of his medical license conveyed to him before he confessed falls within the *Garrity* ruling. We disagree. The facts of the two cases are distinct; further, *Garrity* should not be applied retroactively to cases long since tried.

(a) This case is distinguishable from *Garrity* on the facts.

The defendants in *Garrity* were threatened with discharge if they refused to answer questions on the ground of the Fifth Amendment; the threat was rendered pursuant to a state statute providing for removal from public office solely, and expressly, for claiming the constitutional privilege against self-incrimination. Thus, the wrong condemned in *Garrity* was the "exaction of a price" [17 L.Ed. 2d at 567] specifically and automatically for the exercise of a constitutional right. Similarly, in *Spevack* v. *Klein*, the Court held that the Fifth Amendment proscribed disbarment as a specific "penalty" for asserting the constitutional privilege of silence [17 L.Ed2d at 577]. But here, the loss of license which petitioner faced was not automatic, and the conduct that the investigators said would jeopardize his license was not the assertion of the privilege against self-incrimination, but his deliberate affirmative obstruction of the investigators by false answers designed to lead them astray.

It may be recalled that before the investigators interviewed Dr. Pepe, they had learned from medical students that Pietro D'Alba had given candidates the examination

material in advance of the examination; D'Alba had revealed on July 18, the day before Pepe was questioned, that he had obtained the material from Baviello; and Baviello had just told them, on July 19, that he received the questions from Pepe, who said he had obtained them from someone in Albany (H. Exh. 3, pp. 4-5, 9)—where State officials had composed and filed the examination. Yet the investigators' proper attempts to learn from Pepe the source of the serious breach in professional and official integrity were brazenly rebuffed. When asked straightforwardly about his knowledge of the scandal, Pepe falsely claimed ignorance of any leak, and ridiculously claimed that he had found the notes on the subway. Pepe persisted in this fabrication, despite the visitors' reasonable advice not to commit perjury, and Baviello's announcements that the investigators knew that Pepe had given him the material. When the interrogators' repeated requests to help them "clean our own house" in Albany and guarantee the honesty of future medical examinations had been met with patent lies, the investigators warned Dr. Pepe that nobody would believe his story, and that if he went before the grand jury he would "wind up losing your license here, and in Italy" (1613-14; see 1609). Thus, the threat to petitioner's license was only remotely connected to his answers on July 19, and unrelated to an assertion of constitutional rights.

Not only did the questioning here lack the formal, statutory threat of loss of employment for the invocation of a constitutional right which was condemned in *Garrity,* but there is even doubt as to the effect of the investigators' reference to the medical license. Petitioner's obstinacy continued for some time after the interrogators spoke of

the license. He finally agreed to cooperate when accomplice Baviello and investigator Picard spoke to him on the porch, without any reference to his license, and Baviello again confirmed that he had implicated Pepe and that Pepe had said he got the questions from someone in Albany; then, Pepe revealed that his source was Dr. Ezell, Secretary of the State Board of Medical Examiners. He repeated this statement six days later, on July 25, at the office of the Department of Education, with no threats whatever. It was also established, at the post-trial hearing, that at the interview on July 25 Dr. Pepe was asked about the improper raising of his grades on the 1960 medical examination to a passing mark. When he disclaimed knowledge, despite confrontation with the failing marks on his 1960 test paper, he was warned that he could lose his license because of fraud, but he did not change his statement. Further, Pepe repeated his admissions at the District Attorney's Office on August 9, after clear warnings as to his unqualified right to remain silent.

(b) *Garrity* v. *New Jersey* should not be applied retroactively.

Petitioner's trial was concluded in May, 1962, the Appellate Division affirmed his conviction in July, 1964, and the Court of Appeals' initial determination, remanding the case for a hearing as to voluntariness, was rendered in January, 1965. After the hearing and the second appeal to the Appellate Division, the Court of Appeals upheld the hearing court's ruling on December 29, 1966. The decision in *Garrity* v. *New Jersey* was rendered on January 16, 1967, almost five years after petitioner's trial, and two years after his initial appeal to the Court of Appeals.

It is clear that *Garrity* announced "new law," as that term is used in the jurisprudence of retroactivity. Although the *Garrity* opinion was couched in terms of the Fourteenth Amendment, and refers to "coercion that vitiates a confession," *Garrity* went beyond traditional tests of voluntariness, as petitioner apparently concedes. The Fifth Amendment and the privilege against self-incrimination, cited throughout the opinion, form the foundation of the *Garrity* reasoning. Yet, when petitioner was tried, the Fifth Amendment did not even apply to the States [see *Malloy* v. *Hogan,* 378 U. S. 1 (1964)]. This Court has on several occasions recently pointed out that "in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application' " [*Johnson* v. *New Jersey,* 384 U. S. 719, 16 L.Ed. 2d 882, 888 (1966)]. To date, every Fifth Amendment ruling has been held prospective. The rules of custodial interrogation announced in *Miranda* v. *Arizona,* 384 U. S. 436 (1966) do not apply to cases that were tried before *Miranda* was decided [*Johnson* v. *New Jersey, supra*]. The Fifth Amendment prohibition against comment upon the defendant's silence at trial, newly announced in *Griffin* v. *California,* 380 U. S. 609 (1965), is not retroactive [*Tehan* v. *Shott,* 382 U. S. 406 (1966)]. The reasoning of the *Johnson* and *Shott* cases applies equally here.

In those cases, the Court looked first to the "purpose" of the new Fifth Amendment standards. In *Johnson* the Court found in *Miranda* a policy deterring coercive interrogation; to the extent that this same purpose supported the *Garrity* ruling, prospectivity is indicated. In *Tehan* v.

Shott the Court discerned in *Griffin* v. *California* a purpose of discouraging "penalizing" the assertion of a constitutional right; this appears to be the primary policy of the *Garrity* decision, and, of course, points to prospectivity here as well. Moreover, another consideration in *Johnson* and *Shott* favoring prospectivity was that the previous failure to follow the new standards did not affect the integrity of the fact-finding process. In the instant case as well, traditional standards of voluntariness, coupled with the separate hearing before the judge, adequately insured the integrity of the trial and the verdict of guilt.

In addition to the "purpose" of the new rules, another factor indicating prospective application of *Miranda* and *Griffin* was the reliance placed by police, courts and prosecutors on the previous rules. This Court's discussion of the reliance upon pre-*Miranda* law is particularly pertinent here [*Johnson* v. *New Jersey*, 16 L.Ed.2d at 891-892]:

> "All of the reasons set forth above for making Escobedo and Miranda non-retroactive suggest that these decisions should apply only to trials begun after the decisions were announced. Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test. Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory. Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege."

Finally, the effect of retroactivity upon the administration of justice, the third factor supporting the *Johnson* and *Shott* decisions, also suggests prospectivity here. While the number of cases affected by *Garrity* would be smaller than those affected by *Miranda* or *Griffin,* still it may be presumed that a significant number of convictions of undeniably guilty persons would be needlessly overturned if *Garrity* were retroactive, especially in states like New York where public officers who signed waivers of immunity and testified rather than risk loss of office were subsequently convicted of crimes [*cf. Stevens* v. *Marks,* 383 U. S. 234 (1966)].

POINT III

Petitioner's challenge to the fairness of the hearing was not passed on by the Court of Appeals, and is without merit.

Petitioner claims a deprivation of equal protection and due process in allowing the People to introduce at the post-trial hearing on voluntariness evidence that had not been presented to the jury. This claim was not presented to the Court of Appeals, and that Court's amended remittitur gives no indication that the claim was passed upon.*

* The order of the New York Court of Appeals, dated March 2, 1967, is as follows:

> "Motion by appellant Pepe to amend the remittitur granted; the return of the remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Defendant Pepe contended that his rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States were violated in connection with certain statements given by him to the authorities. The Court of Appeals held that appellant Pepe's constitutional rights were not violated."

On the latest appeal to the Court of Appeals, petitioner did challenge the use of additional evidence at the hearing, although not in the terms raised in the petition. Noting that the hearing elicited evidence that was not presented at the trial, he curiously claimed denial of the "constitutional right to have a jury pass on all the evidence" (brief, p. 24). Presumably, petitioner referred to the New York constitution, since the federal constitution conveys no right to a jury determination as to voluntariness [*Jackson* v. *Denno*, 378 U. S. 368]. The authoritative interpretation of the State constitution on this point was announced in *People* v. *Huntley* [15 N.Y.2d 72, 77 (1965)]. Speaking of hearings conducted after trials already completed, the New York Court of Appeals ruled:

> "As to the type of hearing to be had, there is no constitutional impediment to using the prior record provided that the defendant and the People are permitted to put in additional proof if either side so desires."

Absent from petitioner's puzzling argument, moreover, was an explanation why he did not avail himself of his "right" when the issue of voluntariness was presented to the jury.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1967

APPENDIX

Opinion of the Hearing Court

An attainder by verdict has marked defendants, D'Alba and Pepe, as violators within subdivisions 4, 5, and 6 of section 225 of the Education Law.

At the trial, the People had introduced extra-judicial confessions made by both defendants. The confessions were admitted in evidence subject to the objections of respective counsel.

The Appellate Division on appeal affirmed the judgment of conviction. The Court of Appeals on appeal has remitted the case to me as the trial judge for a hearing, in order to have me determine whether or not the confessions had been made voluntarily. In the meantime, final disposition of the appeal is being held in abeyance pending my reported findings.

At the mandated hearing before me, a number of witnesses testified regarding the circumstances enveloping the confessions, including the various statements made by defendants in response to questions put to them by different persons and at different times. When considered in a tout ensemble pattern (*Fikes* v. *Alabama,* 352 U. S. 191, 197), these sporadic statements, in my opinion, spell out voluntariness. My conclusions of fact explain why I take this view.

That part of the New York statute on confessions, which is relevant to the question in hand, reads (Code Cr. Pro., sec. 395):

> "'A confession of a defendant whether in the course of judicial proceedings or to a private person [People v. Popoff, 261 A. D. 788, 27 N. Y. S. 2d 825],

can be given in evidence against him, *unless made under the influence of fear produced by threats* * * *.'" (Emphasis supplied.)

The law of this State hails with favor a voluntary confession. It is acceptable not only as evidence but also as convincing proof. Such kind of proof is the best example of an inanimate voluntary witness. See Ballentine's Law Dictionary, p. 570. On the other hand, an involuntary confession, by its very nature, is evidence of nothing (*People* v. *Valletutti*, 297 N. Y. 226, 231), or, to say it in a different way, it is mere brutum fulmen.

A review of some of the outstanding authoritative book cases, should prove instructive.

A confession must be the voluntary product of a free and unconstrained will (*Haynes* v. *Washington*, 373 U. S. 503, 514). It must be, to put it in another way, the product of a rational and free will (*Blackburn* v. *Alabama*, 361 U. S. 199, 208). It must proceed from a meaningful act of volition (*Blackburn* v. *Alabama*, *supra*, 211). Convictions following the admission into evidence of confessions which are involuntary, i.e., the product, for instance, of coercion, either physical or psychological, cannot stand (*Rogers* v. *Richmond*, 365 U. S. 534, 540). A confession secured by the torture of the mind is just as contrary to inherent fairness of basic justice as torture of the body (*People* v. *Leyra*, 302 N. Y. 353, 98 N. E. 2d 553). However, a confession obtained by artifice or deception is admissible, unless the deceiving acts amount to deprivation of due process. *People* v. *Everett*, 10 N. Y. 2d 500, 225 N. Y. S. 2d 193.

Appendix

A denial of due process has been defined as the failure to "observe the fundamental fairness essential to the very concept of justice * * *. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict (*People* v. *Leyra, supra*). The trial judge should focus his attention on the question whether the behavior of the state's law enforcement officials was such as to overbear petitioner's will to resist and to note whether they, by such means succeeded in bringing about confessions not freely self determined (*Rogers* v. *Richmond, supra,* at p. 54). The issue in each case resolves itself into the question whether a defendant's will was overborne at the time when he confessed (*Lynumn* v. *Illinois,* 372 U. S. 528, 534). Always the burden is on the People to prove voluntariness beyond a reasonable doubt. *People* v. *Huntley,* 15 N. Y. 2d 72.

All attendant circumstances should be examined in considering whether a confession was obtained by coercion or by improper inducement or by any other illegal method (*Haynes* v. *Washington, supra,* 373 U. S. 503, 513). A judgment must be based upon a consideration of the totality of the circumstances (*Fikes* v. *Alabama,* 352 U. S. 191, 197, *supra*). The barometer is the independence of will by a defendant (*Blackburn* v. *Alabama, supra,* 208). A defendant's character and background are highly material on the issue of voluntariness. *Fikes* v. *Alabama, supra,* 197.

Appendix

Findings of Fact (D'Alba)

For the detailed reasons accounting for my ruling against defendants, I submit the following findings of fact and conclusions of law:

(1) D'Alba is a mature, well educated, and an intelligent individual. He was a medical doctor in Italy.

(2) There is no contention that he was harmed or was threatened.

(3) He was not under arrest at any time during the discussions that tended to make up the extra-judicial confessions.

(4) He made no complaint of abuse to anyone until he testified at the trial.

(5) He signed a waiver of immunity and testified before the Grand Jury on the advice of counsel.

(6) He made no claim to the Grand Jury that he had been coerced.

(7) He repeated his confession to the District Attorney after being advised of his right to counsel and of the right to remain silent.

(8) There is no contention that he was coerced by the District Attorney.

(9) The fear that allegedly took D'Alba's mind prisoner was the fear of his co-conspirators not any fear of the authorities.

Appendix

Findings of Fact (Pepe)

(1) Defendant Pepe is a well educated man, a doctor by profession.

(2) He was not under arrest when he made his confessions.

(3) A confession was elicited as the result of a confrontation with Dr. Baviello on the porch outside Pepe's room.

(4) The only promise (and that was favorable) was made to him was that Picard, an investigator, would include in his report the fact that Pepe was cooperating.

(5) There is no evidence that he was actually harmed physically in any way or threatened with physical harm.

(6) Pepe appeared at the Department of Education six days after the first interrogation, on his own volition and there confirmed with greater detail what he had already said.

(7) He repeated his statement to the District Attorney on August 9, 1961. At that time he was advised of his right to remain silent, but instead, talked.

Conclusions of Law

Included are both defendants:

(1) The extra-judicial confessions composed of sporadic statements were made by both defendants voluntarily.

(2) No public official or private person said or did anything, according to the original record, that could be said to cause a violation of section [3]95 of the Code of Criminal Procedure of this State.

(3) There was no denial of due process.

The long and short of this conspectus leads me to the resolution of denying these defendants any favorable opinion in regard to the challenge of their confessions; consequently, I recommend to the Court of Appeals, the findings of "voluntariness."

Dated, June 21, 1965.